IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,
Petitioner,

vs.

JULIA C. MILLER, Administratrix of the Estate of Ernest F. Miller, Deceased,
Respondent.

No. 433

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri

and

BRIEF IN SUPPORT THEREOF.

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to the Supreme Court of Missouri.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Terminal Railroad Association of St. Louis, a corporation, and respectfully petitions this Honorable Court to grant and to issue its writ of certiorari directed to the Supreme Court of Missouri (hereinafter referred to for convenience as the court below), directing it to send to this Court for review its opinion and judgment rendered and entered July 1, 1942, rehearing in which and motion to transfer to said court en banc were denied July 28, 1942, by Division No. 1 of the court below, in this cause lately there pending, styled Julia C. Miller, Administratrix of the Estate of Ernest F. Miller, Deceased, Respondent, v. Terminal Railroad Association of St. Louis, a Corporation, Ap-

pellant, No. 37,976, on the docket of the court below, affirming a judgment of the Circuit Court of the City of St. Louis, Missouri, in said cause in favor of respondent and against your petitioner herein.

Your petitioner further states that on August 1, 1942, it presented to the Clerk of the Supreme Court of Missouri, En Banc, for filing, its motion in said court en banc to transfer said Cause No. 37,976 from Division No. 1 of said court to said court en banc, but that said clerk of said court en banc, upon order of said court below so to do, refused to accept or file said motion in said court en banc.

OPINION OF THE COURT BELOW.

The opinion of the court below in said cause of Julia C. Miller, administratrix of the estate of Ernest F. Miller, deceased, respondent, v. Terminal Railroad Association of St. Louis, a corporation, appellant, which is by this petition sought to be reviewed, appears on pages ... to ..., inclusive, of the printed transcript of the record filed herein, will be found in 163 S. W. (2d) 1034, but has not yet been published in the official reports of the Supreme Court of Missouri.

JURISDICTION OF THIS COURT.

The action here sought to be reviewed, having been brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), the jurisdiction of this Court is based upon Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 937, Title 28, U. S. C. A., Sec. 344, providing for review in this court by certiorari of decisions of the highest courts of the several states wherein a title, right, privilege or immunity especially set up is claimed under a statute of the United States. Authorities sustaining the jurisdiction are: Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 S. Ct. 635,

58 L. ed. 1062; Minneapolis, St. P. & S. S. M. R. Co. v. Goneau, 269 U. S. 406, 46 S. Ct. 129, 70 L. ed. 335; Gulf, M. & N. R. Co. v. Wells, 275 U. S. 455, 48 S. Ct. 151, 72 L. ed. 370; Atlantic Coast Line Co. v. Davis, 279 U. S. 34, 49 S. Ct. 210, 73 L. ed. 601; Steeley v. Kurn et al., 313 U. S. 256, 61 S. Ct. 934.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action was commenced and maintained by respondent under the Federal Employers' Liability Act (hereinafter called the Act) (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65) to recover from petitioner damages sustained by her (there were no minor children) as a result of the death of her husband, Ernest F. Miller, on July 12, 1940, in the State of Illinois, from injuries he sustained while acting within the scope of his employment by petitioner as a brakeman on the rear end of one of petitioner's trains when a rear end collision occurred between petitioner's train and a train operated by Receivers of the Mobile & Ohio Railroad Company (hereafter referred to as M. & O.) on the east approach of the Eads Bridge, which connects East St. Louis, Illinois, and St. Louis, Missouri.

Respondent pleaded and relied upon general negligence, and submitted her case upon res ipsa loquitur (R. 3, 51, 52).

At the trial it was stipulated that both petitioner and decedent were engaged in interstate transportation and consequently were subject to the provisions of the Federal Employers' Liability Act (R. 8).

The place of accident was within the yard limits of petitioner, over whose track, together with the switches, signals, and appliances in connection with it (R. 12), petitioner's train and the train of the Receivers of the Mobile & Ohio Railroad Company, now the Gulf, Mobile and Ohio

Railroad Company (hereinafter called the M. & O.), were moving (R. 9). Petitioner had promulgated certain rules governing the movement of all trains passing over its tracks (R. 10); and was physically in control of its train upon which decedent was riding, but was not physically in control of the M. & O. train (R. 9).

The Receivers of the Mobile & Ohio Railroad Company were, and had been since their appointment, operating their passenger train over this track with petitioner's knowledge and consent, for the use of which they paid petitioner the same compensation as was paid by any other railroad company or operator of a railroad who used the track in the same way (R. 11).

All of the above facts are stipulated by the parties.

On the merits respondent offered in evidence only the testimony of conductor Chrisman of the M. & O. train, who swore that (R. 15) while passing over the east approach of Eads Bridge in East St. Louis, Illinois, at about fifteen miles an hour (R. 16), he looked ahead of his train and saw appellant's freight train standing still (R. 17) on the same track upon which his train was running and only about 180 feet ahead of his own train (R. 15); he saw decedent standing on the west drawbar of the rear car of the freight train, and saw him leisurely give one stop signal (R. 17). Decedent may have given more than one stop signal, but Chrisman saw him give only one (R. 18).

Chrisman immediately turned and reached for one of the brake valves located on the rear platform, intending to set the air and stop his train; but before Chrisman could reach the air valve the M. & O. engineer applied the air from his air brake valve in the locomotive (R. 16). At that time the passenger train was moving at ten, twelve or fifteen miles an hour; and its speed was reduced considerably between that time and the time of the collision, possibly half, possibly more; the witness could not say (R. 16, 17).

The passenger train was not stopped, it crashed into the rear end of appellant's train and killed Ernest F. Miller, respondent's decedent, at a point on the east approach of Eads Bridge (R. 23).

Petitioner's rule 308 reads as follows:

> "In fog or storm and when view is otherwise obstructed, enginemen and trainmen must be especially alert and move trains under such control as to insure stopping within a distance track is known to be clear. In case of accident responsibility will rest with moving train" (R. 21).

Chrisman said that "running a train under control" means running it at such speed as to be prepared to stop within the distance one can see ahead (R. 24). He had no information that appellant's train was running ahead of his train, either by word of mouth, signal or any other method; nor did he ordinarily get such signals. When a train is running within yard limits, as this one was (R. 19), those in charge of it must be prepared to stop within the distance they can see ahead, no matter where it is (R. 25). Such a rule or custom of keeping a train under control while operating within yard limits had been in effect during the eighteen years Chrisman had been running trains over petitioner's lines (R. 25).

From the time any train traveling east passes Washington Avenue station west of the point of accident until after it passes the point of accident there is no way by which any of petitioner's employees can stop or warn it or control its movement. The M. & O. engineer was, therefore, "on his own" after passing Washington avenue (R. 45, 46); the dispatcher at Washington avenue could not reach him with any order or signal to stop; it was "up to him to look for trains ahead" (R. 46).

Under the conditions present at the time and place of decedent's fatal injury it was not customary for decedent

(the rear switchman) to get off, go back and flag the M. & O. train (R. 34); "he couldn't very well go back to flag" (R. 35).

Petitioner's uncontradicted evidence shows that the M. & O. engineer could have seen petitioner's train from a point 1,890 feet away (R. 39), but could not determine which of two tracks it was on; that when he reached a point 558 feet from petitioner's train he could see decedent on the rear end of the train, could determine that petitioner's train was on the same track over which he was moving (R. 39) and he could have stopped his train within ninety to a hundred feet with safety to his passengers (R. 40).

On April 10, 1874, articles of association for Union Depot Company were filed. The purpose of such incorporation was to "construct, establish and maintain a union station," and lay whatever tracks were necessary to make that station accessible to railroad lines in St. Louis (R. 29).

February 20, 1880, Terminal Railroad of St. Louis was organized, its purpose being to construct, maintain and operate tracks and termini in St. Louis connected with the tracks and facilities of the railroads therein named, and of other railroads, "the general object and purpose being to provide the most ample and convenient connections, accommodations and terminal facilities in St. Louis for all railroads now entering, or hereafter to enter, the same, and all individuals and companies doing business with said railroad (R. 30, 31).

July 26, 1889, Union Railway & Transit Company of St. Louis and Terminal Railroad of St. Louis consolidated under the name of Terminal Railroad Association of St. Louis (R. 31, 32).

Later appellant became the owner of the rights and properties of Union Depot Company (State ex inf. v. Terminal Railroad Ass'n of St. Louis, 182 Mo., l. c. 292).

QUESTIONS PRESENTED.

I.

The ultimate question is: Can there be a recovery under the Act in the conceded absence of the conventional relation of employee and employer between the injured person and the one whose sole negligence produced the injury?

If the answer to this question is negative, the judgment of the court below cannot stand, because it based its opinion upon the ground that "the local law of Illinois made the employees of the M. & O., in law, the employees of defendant in so far as concerns responsibility for the death of Miller" (Opinion, p. 8).

To reach an answer other subsidiary questions must be considered:

(a) Does the act define "employee," "employer," "employed" and "agent"?

(b) If it does not, is the law which does define them substantive or procedural?

(c) If it is substantive the federal rule governs; if it is procedural the law of the forum governs.

(b) Has this Court defined the terms, and if so are its decisions decisive here?

II.

Assuming an affirmative answer to the ultimate queston propounded, supra, it must be based upon the principle that a railroad which voluntarily permits another railroad to move over its tracks becomes liable for the latter's acts because the lessor is not itself voluntarily fulfilling its franchise obligation to operate its railroad, but is doing it through the agency of the company which it per-

mits to use the line. For convenience we hereafter refer to this theory as the "lessor-lessee rule."

But petitioner is not a "line-haul" railroad. It is a union station and terminal railroad company organized exclusively for operating and does operate a union station common to all railroads, together with tracks and facilities "to provide the most ample and convenient connections * * * for all railroads" (R. 30, 31). Consequently, in permitting all "line-haul" railroads to use its station and other facilities, petitioner is strictly fulfilling its franchise obligations in the only legally possible manner, and is not evading a single franchise responsibility. The reason then for the existence of the lessor-lessee rule does not apply to petitioner. Is the rule applicable under these circumstances?

III.

Assuming that the reason given in II, supra, does not take petitioner out from under the application of the assumed general lessor-lessee rule, is it excepted from its operation by this Court's decree compelling it to permit all railroads who so desire to use its facilities upon the same terms?

IV.

Is res ipsa loquitur applicable here, in view of the uncontradicted evidence that decedent was killed by the sole negligence of the M. & O. engineer who was exclusively in physical control of the train which caused Miller's death?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Decedent was in petitioner's employ under such circumstances as to make the act applicable to any action he or his personal representative might bring against petitioner to recover damages for his injury or death, respectively. In other words, recovery must be had if at all in accordance with the act.

I.

There are two primary requisites to a recovery under the act: (1) An employee-employer relationship between the parties, and (2) negligence, "in whole or in part," on the part of the employer-defendant. The first is shown by this record, the second is not. Moreover, this record not only fails to show defendant's (petitioner's) negligence, but shows affirmatively its freedom from negligence, and that decedent's death was caused solely by the negligence of the engineer of the M. & O., which was not a defendant.

Therefore respondent failed to make a case under the act, because she failed to show the existence of a conventional employee-employer relation between petitioner and the engineer of the M. & O., whose negligence was the sole cause of Miller's death.

II.

The act does not define "employee," "employer," "employed," or "agent." Consequently we must go elsewhere to find the meanings of these terms. Because the action is based upon a federal statute, we must go to the federal decisions unless the question is procedural. Obviously, as the question of who is an employee or agent under the act is one which goes directly to the right to maintain the action, it cannot be denied that it is a question of substance, rather than procedure. Therefore, the federal deci-

sions are determinative as to who is an "employee" or "agent" under the act.

This Court has held that "employee" as used in the act means an employee in the conventional sense, that is, a relation established by contract, express or implied, between the parties. This necessarily excludes any legalistic concept that the engineer of the M. & O. was an employee of the petitioner, by reason of the lessor-lessee relationship between petitioner and the M. & O.

III.

But if we should assume that ordinarily the lessor-lessee relationship has the legal effect of making the lessee's employees the lessor's employees, even under the act, and despite the decisions of this Court, nevertheless, petitioner, as a union depot and unified terminal company, is excepted from the operation of that general rule: First, because it is organized and operated as a union depot and unified terminal company for the very purpose of furnishing facilities to user lines, thereby avoiding a multiplicity of railroad tracks and terminals, conserving space, and facilitating the interchange of passengers and freight in congested areas; and, second, because this Court has compelled petitioner to permit any railroad which so desires to use its facilities upon equal terms with all other users, and has directed petitioner to act as the impartial agent of all user lines of railroad. Therefore, it is not only fulfilling the duties laid upon it by its franchises as a union depot and unified terminal company, but is acting under compulsion of this Court as the impartial agent of all of its user lines, and as such agent cannot be responsible for its principals' negligence.

IV.

Neither party to this action disputed any of the other's evidence. Consequently every fact herein mentioned is either admitted or not denied.

Decedent was in the employ of petitioner. The proximate cause of his death was the gross negligence of the M. & O. engineer in failing to stop his train before it collided with petitioner's train, although he had at least five times as much distance as he needed to stop. Petitioner had no possible way to compel him to stop. Admittedly (R. 9) the M. & O. was and petitioner was not in physical control of the M. & O. train, and petitioner was in physical control of its train upon which decedent was riding. Moreover, the undisputed evidence shows that petitioner had no means of signaling the M. & O. engineer from the time his train passed a point west of the place of accident until it reached a point east of the place of accident. Between these two points, as one witness expressed it, the M. & O. engineer was "on his own" (R. 45, 46). It is manifest that there was no occasion for signaling the engineer, as he could see petitioner's train on the track ahead of him when he had at least five times the space required to stop. There is no better signal or warning to stop than a train ahead on the same track. Thus it is obvious that the engineer of the M. & O. was in exclusive physical control of that train, and the happening or avoidance of the collision with petitioner's train was exclusively in his hands. It is equally obvious that petitioner not only was not, but the M. & O. was, exclusively in control of the instrumentality which caused decedent's death. Consequently, the primary basis for the existence of the res ipsa loquitur doctrine is not here shown. That theory is based fundamentally upon the premise of exclusive possession and control by defendant: One in exclusive possession and control of the instrumentality causing the damage is better qualified to speak of the cause of the abnormal action of such instrumentality; defendant had such exclusive possession and control; therefore, he is in a better position to show that such abnormal action did not result from his negligence than is

plaintiff to show that it did result from defendant's negligence. But when the major premise (exclusive possession and control by defendant) is not shown, then inevitably the conclusion cannot follow.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court, addressed to the Supreme Court of Missouri, directing that Court to certify to this Court on a day certain to be named therein, a full and complete transcript of the record of the proceedings in said cause of Julia C. Miller, administratrix of the estate of Ernest F. Miller, deceased, respondent, v. Terminal Railroad Association of St. Louis, a corporation, appellant, that Court's No. 37,976, to the end that said judgment of said Court may be reviewed by this Court, as provided by law, and that upon such review the judgment of said Supreme Court of Missouri in said cause, dated July 1, 1942 (the motion for rehearing and motion to transfer to court en banc, denied July 28, 1942), shall be reversed and that petitioner shall have such relief as to this Court shall seem appropriate.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

This record shows conclusively that no conventional relation of employer and employee existed between petitioner and the engineer of the M. & O., whose sole negligence concededly killed decedent, or between the M. & O. and decedent.

I.

Under these facts may a recovery be had by respondent under the Act? If the answer is negative, then the writ herein sought should issue, because the court below based its opinion upon the ground that "the local law of Illinois made the employees of the M. & O., in law, the employees of defendant in so far as concerns responsibility for the death of Miller" (Opinion, p. 8). In other words, it based its ruling upon an unconventional relation of employer and employee.

(a) To reach an answer to the ultimate question just propounded, we must consider certain subsidiary questions:

(1) The Act does not define "employee," "employer," "employed" or "agent."

(2) Proof of such a relation is a sine qua non to the applicability of the Act. Nothing can be more vital to the existence of a cause of action under the Act. Whether or not a cause of action exists is always a question of substance rather than one of procedure. Consequently, whether or not one is an employee of another is unquestionably to

be determined by substantive rather than procedural law. Therefore, the federal decisions are authoritative.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 58 L. ed. 1062, 34 S. Ct. 635;
T. & P. R. Co. v. Rigsby, 241 U. S. 33, 41, 60 L. ed. 874, 878;
Central Vermont R. Co. v. White, 238 U. S. 507, 511, 512, 59 L. ed. 1433, 1436, 1437;
Southern R. Co. v. Gray, 241 U. S. 333, 338, 339, 60 L. ed. 1030, 1034;
New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367, 371, 62 L. ed. 1167, 1171.

(3) Because this question must be determined by substantive rather than procedural law, and because Congress has exclusively occupied the field of liability as between employer and employee under the record facts here, all state law, both statutory and judicial, has been superseded on questions of substance. Therefore, whether the relation of employer and employee existed between petitioner and the M. & O. engineer, respectively, must depend wholly upon federal decisions.

See authorities last above cited.

(4) This Court holds that "employee" and "employed" are used in the Act in their ordinary sense and to designate the conventional relation of employee and employer, and that absent this conventional relation between the employer-defendant and the injured employee, respectively, no recovery may be had under the Act.

Robinson v. B. & O. R. Co., 237 U. S. 84, 59 L. ed. 849;
C. & A. R. Co. v. Wagner, 239 U. S. 452, 60 L. ed. 379;
Hull v. Philadelphia & Reading R. Co., 252 U. S. 475, 64 L. ed. 670.

(b) North Carolina R. Co. v. Zachary, 232 U. S. 248, 254, 58 L. ed. 591, 595, apparently is in conflict with the three decisions last above cited, as well as with many other decisions of this Court, which hold that by passing the Act Congress has exclusively occupied the field of liability of an employer for injuries to or the death of an employee under circumstances which make the Act applicable, with the result that all state law, statutory and judicial, has been superseded on questions of substance.

See authorities under I (a) (2), supra.

(c) There are three possible theories which destroy the decisive effect of the Zachary case: (1) It is wrong, (2) it has been overruled by later decisions of this Court, and (3) it is distinguishable from the case at bar.

(1) Is the Zachary case wrong? This Court stated and followed the local rule of North Carolina, viz., that a lessor railroad company is liable for the acts of its lessee, because the latter is the former's "substitute or agent" in the performance "of the public duties assumed by the lessor under its charter."

Is the local law applicable? The answer is unquestionably negative, because obviously whether or not the employer-employee relation exists is a basic question, and, therefore, one of substance rather than procedure. This Court so says.

Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 501, 58 L. ed. 1062, 1068, 34 S. Ct. 635;
Central of Vermont R. Co. v. White, 238 U. S. 507, 511, 512, 59 L. ed. 1433, 1436, 1437.

(2) Because both of these decisions are subsequent to the Zachary opinion, and because they both interpret the Act and reach conclusions contrary to that reached in the

Zachary opinion, they by very strong implication overrule the Zachary Case.

(3) Moreover, the North Carolina Railroad Company did not operate any part of its railroad, but confined its activities "to receiving annual rents and distributing them among its stockholders" (232 U. S., l. c. 257, 58 L. ed., l. c. 595). That is not at all the condition here, as petitioner is very actively engaged in exercising its franchise rights and fulfilling its franchise obligations, in exactly the manner required by its franchise and ordered by this Court.

See authorities under II (b), post.

II.

But even though it should be assumed that because the Act does not define the terms here involved, determination of their meanings is a matter of procedure, that because the case was tried in a state court the terms must be defined by the state law; and that under the state rule any railroad which permits another railroad to use its tracks becomes liable for the acts of the user railroad, on the theory that the latter is the agent of the former, how stands the case?

(a) The lessor-lessee rule is based upon the theory that no railroad company may escape its franchise obligations to operate a railroad by voluntarily permitting another to operate it. Some of the courts say this makes the user line the agent of the lessor line, because the former is performing a duty cast by law upon the latter.

East Line R. Co. v. Culbertson (Tex. Sup.), 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 897;
Williard v. Spartanburg U. & C. R. Co., 124 F. 796, 800 et seq.;
Hukill v. Maysville & B. S. R. Co., 72 F. 745;
Hulen v. Wheelock (Mo. Sup.), 300 S. W. 479, 485.

(b) But the rule cannot be applicable to petitioner, because it is based upon the premise that it is the franchise duty of the chartered railroad itself to operate its line of railroad and not to operate it through another railroad company. That is not this case. Petitioner is operating its properties, but it is a union station and terminal company whose charter purpose is to furnish to line-haul railroads a unified terminal system consisting of a union depot and tracks and facilities "to provide the most ample and convenient connections, accommodations and terminal facilities in St. Louis for all railroads" * * * (Petitioner's Charter, R. 31). It could not fulfill its franchise obligations without providing these connections and without making them available to all of the line-haul railroads. Thus, in permitting the M. & O. train to pass over its track on the occasion in question, it was strictly fulfilling its corporate obligations. It was not conducting its corporate business through a substitute or agent, but was itself conducting its own business strictly in accordance with its franchise duties. Consequently, as the reason for the application of the lessor-lessee rule does not exist in this case, the rule is inapplicable.

Georgia Railroad & Banking Co. v. Friddell, 79 Ga. 489, 7 S. E. 214, 11 Am. St. Rep. 447.

(c) But even if we should further assume that the lessor-lessee principle is not taken out of this case by either the provisions of the act or by reason of the fact that petitioner is strictly fulfilling its franchise duties and as a consequence the reason for the application of the rule is not present in this case, nevertheless, the lessor-lessee rule is not applicable to petitioner for the reason that it rests upon the assumption that the law creates the relation of principal and agent between lessor and lessee, respectively; whereas the relationship between petitioner and the M. & O. and all of the other user lines, is the exact opposite. This Court

holds that petitioner is, and in order to avoid prosecution as an unlawful monopoly must continue to be, the impartial agent of each line of railroad which uses petitioner's facilities. Therefore, while the using lines would be liable for the acts of petitioner on the ground that petitioner is the agent of each of them, petitioner, as such agent, could not be liable for the acts of its principals. In other words, petitioner cannot be liable under the respondeat superior doctrine for the acts of the using lines, because it is not the superior and the using line is.

U. S. v. T. R. R. A., 224 U. S. 383, 56 L. ed. 810;
U. S. v. T. R. R. A., 236 U. S. 194, 59 L. ed. 535;
State ex inf. v. T. R. R. A., 182 Mo. 284, 296 et seq.

(d) Under these decisions petitioner has no choice as to who shall use its terminal facilities. It must by decree of this Court permit any line haul railroad which chooses so to do to use its facilities on exactly the same terms as does every other line-haul railroad. Its permission to use, therefore, is involuntary rather than voluntary, and, consequently, it is without the lessor-lessee rule of liability.

Smith v. Philadelphia, Baltimore & Washington R. Co., 46 App. (D. C.) 275.

III.

The court below applied the res ipsa loquitur doctrine on the theories that "the local law of Illinois made the employees of the M. & O., in law, the employees of defendant, in so far as concerns responsibility for the death of Miller, and also in view of the fact that dispatch office employees of defendant controlled the movement of both trains" (Opinion, page 8).

We have disposed, supra, of the first theory relied upon by the court below for the application of that doctrine.

It is conceded petitioner had no physical control over the M. & O. train. The cardinal principle of res ipsa loquitur is exclusive physical control by defendant of the instrumentality which produced the injury.

Scott v. Louden Dock Co., 3 Hurl. & Co. 596 (Ex. 1865);
45 C. J., Sec. 768, p. 1193;
38 Am. Jur., Sec. 300, pp. 996, 997;
Wigmore on Evidence (3rd Ed.), Vol. 9, Sec. 2509, p. 380 et seq.;
San Juan Light & T. Co. v. Requena, 224 U. S. 89, 56 L. ed. 680, 684;
Louisville & Nashville R. Co. v. Chatters, 279 U. S. 320, 73 L. ed. 711, 719.

This disposes of the second reason given by the court below.

ARGUMENT.

The Act provides that "Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * or in case of the death of such employe * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier * * *."

To recover plaintiff must prove:

(1) Defendant was a common carrier;

(2) Employment of plaintiff (or his intestate in case of death) by defendant;

(3) Injury to plaintiff (or death of plaintiff's intestate);

(4) Caused in whole or in part by defendant's

(a) officers,
(b) agents, or
(c) employes.

Are these requirements met?

(1) Defendant (petitioner) was and is a common carrier.

(2) Decedent was employed by defendant.

(3) Respondent's intestate was killed.

(4) But his death was not caused in whole or in part by any of defendant's (a) officers, (b) agents, or (c) employees, but solely by the negligence of the M. & O. engineer, unless the fact that the M. & O. train was moving over petitioner's track is sufficient to make the M. & O. engineer petitioner's "agent" or "employee." Obviously he could under no theory have been an officer of petitioner.

Manifestly any relation of principal and agent or employer and employee created by the lessor-lessee rule is unconventional. It is a relation in law, but not in fact. Webster's Dictionary defines "conventional" to be:

> "Formed by agreement or compact; stipulated; contractual; opposed in law to legal and judicial."

As the M. & O. engineer did not become petitioner's employee "by agreement or compact," stipulation or contract, he undoubtedly was not petitioner's employee in the conventional sense. Because "conventional" means in fact as distinguished from in law—"opposed to legal and judicial"—a conventional agent or employee is one in fact rather than one in law.

I.

Thus we reach the ultimate question for determination: Can there be a recovery under the Act in the conceded absence of the conventional relation of employee and employer between the injured person (or in this case respondent's decedent) and the one whose sole negligence caused the injury? If the answer to this question must be in the negative, the judgment of the court below cannot stand. It answered it in the affirmative, saying:

> "The local law of Illinois made the employees of the M. & O. in law the employees of defendant in so far as concerns responsibility for the death of Miller" (Opinion, p. 8).

In other words, the court below based its judgment on an unconventional (legal and judicial) relation of employer and employee instead of upon the conventional (in fact, or "opposed to legal and judicial") relation of employer and employee.

(a) To answer this principal question it will be necessary to consider several subsidiary questions: (1) Are

"employee," "employer," "employed" and "agent" defined in the Act? (2) Is the question whether or not the relation of employer and employee (used hereafter to mean principal and agent as well) one of substance or of procedure? (3) If it is one of substance, is it to be answered by reference to federal decisions or (as this case was tried in a state court) by state decisions? (4) If it must be answered by the federal decisions, has this Court passed on it?

(1) The Act does not define "employee," "employer," "employed" or "agent." Therefore, we must determine elsewhere the meanings of these terms. To what source shall we go for that purpose?

(2) and (3) Proof of the relation of employer and employee is absolutely essential to the maintenance of an action under the Act. Obviously, therefore, proof of the existence of the relation is very much more substantial than upon whom rests the burden of proving contributory negligence or freedom from it. Yet this Court has said that who must carry that burden is a question of substance rather than of procedure, and that therefore the determination of the question must be had under the federal decisions rather than under those of the state in which the cause is tried. Central Vermont R. Co. v. White, 238 U. S. 507, 511, 512, 59 L. Ed. 1433, 1436, 1437.

(4) This Court has held directly that "Congress used the words 'employee' and 'employed' in the Act in their natural sense, and intended to describe the conventional relation of 'employer' and 'employee.'" As the word "agent" is used in the same section of the statute, in the same sentence, and is separated from the word "employee" only by the word "or," it is inevitable that Congress used it also in its "natural sense and intended to describe the conventional relation of" principal and agent.

In Robinson v. B. & O. R. Co., 237 U. S. 84, 59 L. ed. 849, plaintiff, a Pullman porter, was injured while moving over defendant's line of railroad. In his contract of employment with his employer, The Pullman Company, Robinson released all railroads over whose lines he might travel in the scope of his employment "from all claims for liability of any nature or character whatsoever on account of any personal injury or death."

Section 5 of the Act provides that "any contract * * * the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act shall to that extent be void."

Necessarily if plaintiff was an employee of defendant, the release of railroads provision of his employment contract with The Pullman Company was void by reason of the provisions of the above section of the Act. As this Court said:

> "The inquiry rather is whether plaintiff comes within the statutory description; that is, whether, upon the facts disclosed, it can be said that within the sense of the act the plaintiff was an employee of the railroad company * * * We are of the opinion that Congress used the words 'employee' and 'employed' in the statute in their natural sense, and intended to describe the conventional relation of 'employer' and 'employee.' "

In the later case of Chicago & Alton R. Co. v. Wagner, 239 U. S. 452, 456, 60 L. ed. 379, 381, Wagner, a conductor of C. B. & Q. R. Co., in charge of one of his employer's trains moving over defendant's tracks in the City of Chicago, under an arrangement between the two railroad companies, was injured by a semaphore post allegedly too close to the track.

"Wagner was a member of the relief department of the Burlington Company, to which the employees of that com-

pany made monthly contributions, and (that) in his agreement with that company it was provided that his acceptance 'of benefits for injury' should operate 'as a release and satisfaction of all claims against said company and all other companies associated therewith in the administration of their relief departments, for damages arising from or growing out of said injury.' The Alton Company was not thus associated with the Burlington Company, and the release by its terms did not run to it. But it was insisted that the Burlington Company was a joint tort-feasor with the Alton Company, and hence that release to the former would operate to discharge the latter."

Section 5 of the Act permits a railroad company to set off against any judgment rendered against it under the Act whatever "sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

The Alton Company took the position that because Wagner had accepted benefits from the Burlington, such acceptance released the Alton Company because it was a joint tort-feasor with the Burlington Company. Wagner met this contention by saying that his agreement of release was void under section 5 of the Act.

If the opinion of the court below in the case at bar is correct in applying the Illinois law to the case at bar, necessarily the Act would have been applicable to Wagner's case, which arose and was tried in Illinois. In the case at bar decedent was employed by petitioner and recovered on the negligence of the M. & O., whereas Wagner was employed by Burlington and recovered on the negligence of Alton. Thus the employee-employer relationship and the identity of the tort-feasor was exactly analogous in each case. The only difference is that in the case at bar respondent sued petitioner (the Burlington in

the Wagner case), whereas in the Wagner case he sued Alton (the M. & O. in the case at bar). In each case but one of the essential requisites of applicability of the Act was present: In the Wagner case the negligence of defendant, and in the case at bar the employee-employer status between decedent and petitioner. In each case one of the primary requisites was absent: In the Wagner case the employee-employer relationship between Wagner and Alton, and in this case the negligence of defendant. The existence of the relationship is just as necessary (but no more so) as negligence, and vice versa.

The common-law lessor-lessee rule of liability of Illinois was just as applicable (but no more so) to the Wagner case as to the case at bar. In other words, if the Illinois common-law rule that a railroad which permits another railroad to use its tracks is liable for the user's acts (the rule applied by the court below in the case at bar) is applicable to the case at bar, it was equally applicable (but no more so) to the Wagner case. Under that rule as applied by the court below in the case at bar Wagner could have bottomed his action upon the Act as the court below holds that recovery may be had under the Act upon a showing of negligence by one other than the employer, and by whom decedent was not employed in the conventional sense. Implicit in this holding and the reasons assigned for it is the conception that the lessor-lessee rule of Illinois makes the employees of both the lessor and the lessee employees of the lessor for the purposes of the Act. Therefore, under the ruling of the court below, Wagner could have sued Alton as one of its employees, and could have bottomed his action upon the act.

But this Court said in the Wagner case:

> "The action was not brought under that act. There were allegations in the original declaration to the effect that Wagner, at the time of the injury, was en-

gaged in interstate commerce as an employee of the Burlington company, but it seems to have been agreed upon the trial that the action was not governed by the federal statute; and this indeed was manifest, as the Burlington company was not a party to the action, and the Alton company was not the plaintiff's employer. Robinson v. Baltimore & O. R. Co., 237 U. S. 84, 91, 59 L. ed. 849, 851, 35 Sup. Ct. Rep. 491, 8 N. C. C. A. 1. It was tried as a common-law action on the case."

In Hull v. Philadelphia & Reading R. Co., 252 U. S. 475, 64 L. ed. 670, the decedent was in the employ of Western Maryland R. Co. His administratrix sued the defendant over whose lines decedent was passing on a Western Maryland train when he was killed by one of defendant's locomotives.

There was a contract between the two railroad companies providing in detail for the operation of trains of each company over the lines of the other. As in the Wagner case, supra, plaintiff sued the lessor line, whose negligence caused her decedent's death; but unlike the Wagner case, she brought her action under the Act upon the following theories: (1) A general servant in the employ of one becomes the servant of another when at the decisive time he is doing the work of the other; (2) because it is the nondelegable duty of a railroad company to operate its railroad, and if it permits another to perform that duty that other becomes the former's servant.

These two theories when combined make what we term for brevity the lessor-lessee theory, viz., that a lessor railroad company (licensor, permittor, contractor, etc.) is liable for the acts of the lessee railroad company (licensee, permittee or contractee, etc.).

Thus it is seen that in the Hull case there was directly involved the lessor-lessee liability rule upon which the court below determined this case.

Nevertheless this Court said (252 U. S., l. c. 479, 480, 64 L. ed., l. c. 673):

"We hardly need repeat the statement made in Robinson v. Baltimore & O. R. Co., 237 U. S. 84, 94, 59 L. ed. 849, 853, 35 Sup. Ct. Rep. 491, 8 N. C. C. A. 1, that in the Employers' Liability Act Congress used the words 'employee' and 'employed' in their natural sense, and intended to describe the conventional relation of employer and employee. The simple question is whether, under the facts as recited, and according to the general principles applicable to the relation, Hull had been transferred from the employ of the Western Maryland Railway Company to that of defendant for the purposes of the train movement in which he was engaged when killed. He was not a party to the agreement between the railway companies, and is not shown to have had knowledge of it; but, passing this, and assuming the provisions of the agreement can be availed of by petitioner, it still is plain, we think, from the whole case, that deceased remained for all purposes—certainly for the purposes of the act—an employee of the Western Maryland Company only. It is clear that each company retained control of its own train crews; that what the latter did upon the line of the other road was done as a part of their duty to the general employer; and that, so far as they were subject while upon the tracks of the other company to its rules, regulations, discipline and orders, this was for the purpose of co-ordinating their movements to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the companies. See Standard Oil Co. v. Anderson, 212 U. S. 215, 226, 53 L. ed. 480, 485, 29 Sup. Ct. Rep. 252.

"North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. Rep. 305, 9 N. C. C. A. 109, Ann. Cas. 1914 C, 159, is cited, but is not in point, since in that case the relation of the parties was controlled by a dominant rule of local law, to which the agreement here operative has no analogy."

(b) North Carolina R. Co. v. Zachary, 232 U. S. 248, 254, 58 L. Ed. 591, 595, is in apparent conflict with the Robinson, Wagner and Hull cases, as well as with the cases cited heretofore in the summary of argument I (a) (2), which declare that by passing the Act Congress exclusively occupied the field of liability between employer and employee under circumstances which make the Act applicable, thereby superseding all state law, statutory and judicial, on questions of substance.

The record in the Zachary case discloses that the North Carolina Railroad Company had leased all of its facilities to the Southern Railway Company, performed none of its franchise duties, and confined its corporate activities "to receiving annual rents and distributing them among its stockholders."

Zachary, an employee of Southern Railway Company, sued the North Carolina Railroad Company under the act, based his cause of action upon the negligence of his own employer, but brought his action against his employer's lessor.

This Court stated that, because the local law of North Carolina made the defendant in the Zachary case liable for the acts of its lessee, Zachary might maintain an action under the act.

(c) There are three possible theories which destroy the Zachary case as an authority on this question.

(1) This Court decided it on the lessor-lessee rule locally followed in the State of North Carolina, which made the lessee's employees, in law, the lessor's employees. As we have demonstrated, supra, I (2), (3), the question whether the employer-employee relation exists within the meaning of the act is indubitably one of substance, and is, therefore, to be decided, not by the local law of any state, but by the federal law. Because this was not done by this Court in the Zachary case, this Court's decision is wrong and should be specifically overruled.

(2) It has been impliedly overruled by the Robinson, Wagner and Hull cases heretofore discussed.

(3) Moreover, the North Carolina Railroad Company made no pretense of operating its railroad properties as it had been chartered to do, but entered into a contract with Southern Railway Company whereby it leased to that company all of its property, performed none of its charter duties or obligations, and confined its activities "to receiving annual rents and distributing them among its stockholders." This is in direct contrast to the condition here. Petitioner is a union depot and terminal company, chartered for the very purpose of permitting line-haul railroads to use its facilities to the fullest extent. The more other lines use its facilities the better it is fulfilling its charter duties, the better service it is rendering to the public and the line-haul railroads. Instead of avoiding any of its charter obligations and duties, it is strictly and to the letter fulfilling them. Moreover, it is compelled to do this by order of this Court, as will be more fully developed, post, II (b).

II.

Even though we should assume that because the Act does not define the terms here involved, the interpretation of them is a question of procedural law; that because this case was originally tried in a state court, the terms must be defined by the state law; and that under the state rule the lessor-lessee rule makes the M. & O. engineer, in law, the servant of petitioner, is that rule applicable under the circumstances shown in this record?

(a) The lessor-lessee rule is based upon the theory that no railroad company may escape its franchise obligations to operate a railroad by voluntarily permitting another railroad company to operate it. Where the rule is recognized at all, it is said that the lessee line becomes the agent

or servant of the lessor line because it is performing the duties cast by law upon the lessor or owner of the railroad. In other words, the charter is a contract between the state and the railroad company whereby the state agrees to permit the railroad compay to organize and operate a railroad, and the latter agrees so to do. Thereby the railroad company becomes obligated to operate a railroad for the benefit of the public. Consequently it is held by some courts that if the chartered railroad company leases all of its properties to another railroad company, and the latter operates the railroad, the owner railroad is meeting its obligations to the public only by and through the acts of the operating company which thereby becomes the agent of the owner compay, and the latter is therefore responsible for the acts of the operating company.

(b) But this rule cannot be applied to petitioner because it is based upon the premise that it is the franchise duty of the chartered line to itself operate its line of railroad; that it has voluntarily failed to do so, and is permitting another railroad company to do so for and in its behalf. That is not at all the case here.

Petitioner was chartered to do exactly what it is doing, and it is fulfilling to the letter its franchise obligations and duties.

The Union Depot Company, organized in 1874, was created for the purpose of constructing and maintaining a union station for receiving and discharging passengers, and was authorized to lay the necessary tracks to make such depot or station accessible. It was further authorized "to make such arrangements with railroad, tunnel, bridge, or other companies, as may be necessary to connect other tracks with their own," and to make proper and reasonable charges for the use of its depot and appliances (R. 29).

The Terminal Railroad of St. Louis was organized in 1880. One of its charter purposes was to construct, main-

tain and operate tracks from the tracks and termini of Union Railway and Transit Company of St. Louis, the Union Depot Company of St. Louis, the Tunnel Railroad of St. Louis, and other railroads specifically mentioned, and from the tracks and termini "of any other railroad entering or to enter said City of St. Louis, and the places to which said road is to be constructed, maintained, and operated, are the yards, depots, and side tracks, now existing, or to be provided, in said City of St. Louis, and such connections with other railroads already constructed, or to be constructed, as may be found necessary or convenient, and such factories or other establishments, as may need such connections, the general object and purpose being, to provide the most ample and convenient connections, accommodations and terminal facilities in St. Louis for all railroads now entering, or hereafter to enter the same, and all individuals and companies doing business with said railroads" (R. 30, 31).

In 1889, by proper agreement, Union Railway and Transit Company of St. Louis and Terminal Railroad of St. Louis were consolidated under the name of "Terminal Railroad Association of St. Louis" (R. 31, 32, 33).

The Union Railway and Transit Company of St. Louis was a corporation which owned certain tracks and facilities necessary to co-ordinate and unify the terminal facilities. Subsequent to the consolidation of that company and Terminal Railroad of St. Louis, whereby Terminal Railroad Association of St. Louis came into existence, the latter took over Union Depot Company completely, both its franchise and its property.

Exactly in point on principle is the case of Georgia Railroad & Banking Company v. Friddell, 79 Ga. 489, 11 Am. St. Rep. 447, 7 S. E. 214, which was an action wherein respondent Friddell, who was in the employ of appellant, was injured by the train of another railroad using appel-

lant's tracks. In denying the applicability of the lessor-lessee principle, the Supreme Court of Georgia said:

> "We think it makes no difference whether there was a contract or not (between the two companies for the use of the track). If each of these companies had the charter right to come to the City of Atlanta, as each of them had, they could use a common track at a terminal point belonging to them jointly, or tracks in common, belonging to them severally; and in the use of either, each company would be upon its own franchise. It would not be exercising the franchise of the other company. That is the distinction. Hence, the verdict in this case was wrong. There could be much said in favor of several companies having the same privilege, which we think they have, to use the same track in common in a city; and we know nothing that would subject one company to (liability to) its employees (however, the passenger's rule of liability would be different) for the negligence of employees of another company. The risk of service covers this, and an employee is not without redress. He cannot sue his own master, but he can sue the other company—the one whose employees were at fault, and recover against it. So we rule and set out in the head-notes, and rest the case upon what we think is the fair principle applicable to the facts. Where numerous railways connect in the same City, the City is a common station for all; and interchange in the use of tracks is a needful practice for the accommodation of traffic. It promotes the common interest of the companies, and the interest of the public, and employees who are unwilling to expose themselves to the risks of so reasonable a method of business are not abreast with the exigencies of railway service."

In United States v. Terminal Railroad Association of St. Louis, 224 U. S. 383, 56 L. Ed. 810, 816, this Court recognized the difference between petitioner and the ordinary line haul railroad company. It there said:

"We are not unmindful of the essential difference between terminal systems properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines and in the collection and distribution of traffic. They are a modern evolution in the doing of railroad business, and are of the greatest public utility. They, under proper conditions, do not restrain, but promote, commerce."

(c) There is a further reason why the lessor-lessee rule cannot be applied to petitioner. It rests upon the legal fiction that the relation of principal and agent exists, respectively, between the lessor and the lessee lines, whereby the former becomes liable for the acts of the latter under respondeat superior. Unless that situation exists between petitioner and the M. & O., inevitably the rule cannot apply in this case.

This Court has settled the matter for all time by holding that whereas the relation of principal and agent did exist between the M. & O. and petitioner, the latter was the agent of the former, rather than the principal of the latter. United States v. Terminal Railroad Association, 224 U. S. 383, 56 L. Ed. 810.

The United States prosecuted petitioner as an unlawful combination in restraint of trade and sought its dissolution. This Court refused to dissolve petitioner, but compelled it to act as the impartial agent "of every line which is under compulsion to use its instrumentalities." In the course of its opinion this Court said (56 L. Ed., l. c. 819):

"Plainly the combination which has occurred would not be an illegal restraint under the terms of the statute if it were what is claimed for it, a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities. If, as we have pointed out, the violation of the statute, in view of the inherent physical conditions, grows out

> of administrative conditions which may be eliminated and the obvious advantages of unification preserved, such a modification of the agreement between the terminal company and the proprietary companies as shall constitute the former the bona fide agent and servant of every railroad line which shall use its facilities, and an inhibition of certain methods of administration to which we have referred, will amply vindicate the wise purpose of the statute, and will preserve to the public a system of great public advantage."

In the later appeal of the case, 236 U. S. 194, 59 L. ed. 535, the Court found that appellant had complied with the requirements laid down in the previous opinion, by becoming the impartial agent of each line-haul railroad using appellant's facilities.

Thus, it is seen that this Court ordered and directed that petitioner, as a condition to its continued operation, should become "the impartial agent of every line which is under compulsion to use its instrumentalities." In the second opinion mentioned it was found that petitioner had complied with that requirement. Therefore, petitioner is now, and was at the time of decedent's death, the agent of the M. & O., but not its principal. Obviously, in its relation to the M. & O., it could not be both principal and agent at the same time, nor could the M. & O., in its relation to petitioner, be both principal and agent at the same time. Petitioner, by these decrees of this Court, became and was on the day of decedent's injury and death the agent of the M. & O. If it was the agent, then it was not the principal, and is not liable for the acts of the M. & O. upon the theory that the M. & O. was petitioner's agent. But to make petitioner liable for the acts of the M. & O., it must have been the principal of the M. & O. at the time the decedent was killed. It was not and could not have been such principal, in view of the decisions of this Court, which compelled exactly the converse relation. Obviously, therefore, the lessor-lessee theory is not applicable here

because that is made to depend upon the relationship of principal and agent, the lessor being the principal and the lessee the agent, whereas the status here shown is the exact reverse. The agent never can become liable for the acts of his principal. Therefore, where, as here, the negligence is shown to be that of the principal rather than that of the agent, the latter cannot be liable for the former's negligent acts.

(d) But there is another reason why this lessor-lessee rule cannot apply to petitioner, viz., it is based upon the voluntary failure of the lessor to fulfill its charter obligations. Petitioner has not only not voluntarily failed or refused to perform its franchise duties, but even if it so desired it could not do so and keep its corporate charter.

Under the decisions of this Court, heretofore mentioned, it must permit all line-haul railroads which so desire to use its tracks and other facilities upon exactly the same basis. Unless it does this, it must cease to operate, because it and its associated companies become an illegal combination in restraint of interstate commerce. Thus it is under compulsion to do exactly what would inevitably make it liable for all of the acts of all of the line-haul railroads who use its tracks if the lessor-lessee principle is applicable. That principle cannot be effective except upon the voluntary act of a corporation which seeks to evade its franchise responsibilities. Appellant has no choice in the matter but must grant to every line-haul railroad which seeks it, permission to use its facilities; not for the purpose of evading its franchise obligations, but of fulfilling them.

Smith v. Philadelphia, Baltimore & Washington R. Co., 46 App. (D. C.) 275, was a case in which plaintiff's decedent was an employee of defendant, and was struck and killed by a locomotive owned and being operated over defendant's tracks by Southern Railway Company under an operating agreement between the two companies and other companies using defendant's facilities.

Two Acts of Congress approved February 12, 1901, and February 28, 1903, provided that any railroad now or hereafter lawfully existing and authorized to extend a line of railroad into the District of Columbia, or having secured the right to operate over the lines of any other railroad, to a point of connection with the tracks of said defendant Terminal Company, shall have the right to joint use of said station and terminals upon the payment of a reasonable compensation for their use, and upon other considerations mentioned in said acts.

In denying a recovery the Court said:

> "It is apparent from these acts that Congress contemplated and provided for the construction of a general Union Station for all railroads passing through the District of Columbia. The railroad tracks belonging to the defendant and the Baltimore & Ohio Railroad Company were required to be used by the Southern Railway Company and any other railroads hereafter entering the District of Columbia. This provision was not optional, and in case of a failure to agree, a tribunal was provided for determination of the amount of compensation. It is true that the contracts made under these statutes required the using companies to obey the rules and regulations of the defendant. Some general rules and regulations had to be observed in the conduct of the trains to prevent confusion and accident, and this was contemplated by Congress, which authorized the contracts. It is clear then that the plaintiff's intestate was an employee of the defendant; that he was killed upon defendant's tracks by an engine operated by the Southern Railway Company in accordance with the provision of the Act of Congress and of the contract aforesaid. The negligence was the negligence of the Southern Railway Company, and not of the defendant, and the Court was right in refusing to enter a judgment for the plaintiff on the verdict.
>
> "The judgment is affirmed."

This Smith case is a direct authority sustaining our position on this question. The only difference between that case and this case is that in the former the compulsive instrumentality was Congress, whereas in this case it is this Court. It is impossible to see why the principle should not apply to the Smith case and should apply to the case at bar. The mere fact that in the one instance the compulsion originated in the United States Congress and in the other in this Court, cannot affect the principle involved. In each instance the terminal company had no choice but had to comply with the demand of a superior authority. Moreover, the reasoning of the Smith case is sound and should be followed for the reasons heretofore set out.

III.

As heretofore stated, this case was submitted to the jury upon the res ipsa loquitur principle. Unless the lessor-lessee rule applies, that was error, because the engineer of the M. & O. was in the exclusive physical control of his train, and had ample opportunity to stop it before killing decedent. It is quite true that he was moving over petitioner's track under the orders of the latter's dispatching employee. But any negligence on their part (and there was none) could not have been the proximate cause of Miller's death, because the engineer had more than ample time and space within which to stop before he struck petitioner's train.

For these reasons the writ here sought should issue.

Respectfully submitted,

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(13)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

No. 433.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
a Corporation,
Petitioner,

vs.

JULIA C. MILLER, Administratrix of the Estate of
ERNEST F. MILLER, Deceased,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Missouri.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

While the statement of the matter here involved which is made in petitioner's petition for a writ of certiorari and brief in support thereof is not grossly inaccurate or objectionable, we believe that it does omit some of the details which are essential to a correct and proper understanding of the case and the matters here involved. Accordingly, respondent will undertake a statement of her own.

This action was brought by the respondent, Julia C. Miller, administratrix of the estate of Ernest F. Miller, deceased, as plaintiff, against the petitioner, Terminal Railroad Association of St. Louis, as defendant, in the Circuit Court of the City of St. Louis, Missouri, to recover damages under the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, 35 Stat. 65, as amended, 45 U. S. C. A. §§ 51-60) for the death of her husband and intestate, Ernest F. Miller, which occurred on July 12, 1940, in East St. Louis, Illinois.

The Pleadings.

The pleadings, while not generally remarkable, should be given some consideration.

The respondent's (plaintiff's) petition (R. 2-4), after alleging the formal matters necessary to bring plaintiff's case within the Federal Employers' Liability Act—including the facts that the intestate was an employee of defendant, that defendant was an interstate railroad, and that both were engaged in interstate commerce—alleged, in substance, that the law of Illinois, as announced in several specified decisions of the Supreme Court of that state, was to the effect that, where the owner of a railroad authorizes or permits another to use its tracks and an injury results from negligent or unlawful operation, the owner and user are jointly and severally liable to the person injured, and the user and his servants become and are the agents and servants of the owner. The petition then further alleged, in substance, that while the intestate was engaged in working upon one of petitioner's freight trains being operated upon and over petitioner's tracks and properties in interstate commerce in East St. Louis, Illinois, on the 12th day of July, 1940, he was killed as the result of a passenger train being operated over and along petitioner's said track and into collision with the rear end of

said freight train; that such collision and death resulted in whole or in part from the negligence and carelessness of the petitioner, its agents, servants and employees other than the intestate, and "that said trains and the movement and operation thereof, and the means, devices and appliances controlling the movement and operation of said trains were within the exclusive custody and control of defendant, its agents, servants and employees, other than said Ernest F. Miller" (R. 4).

The petitioner's (defendant's) answer (R. 5) consisted of a general denial, coupled with a plea that petitioner is a terminal and union depot corporation organized under and subject to Sections 5251 and 5252 of the Revised Statutes of Missouri 1939, "and as such company is not liable for the acts of any railroad company operating over defendant's tracks."

The Evidence.

There is no conflict in the evidence in this case, although respondent does not concede all of the facts tended to be established by some of petitioner's evidence. The evidence of the parties tended to establish the following:

The petitioner is and was a railroad corporation organized under the laws of Missouri (R. 31-32), engaged in interstate commerce (R. 27), and owning numerous railroad tracks and properties in and about the Cities of St. Louis, Missouri, and East St. Louis, Illinois (R. 27). The mainline tracks of the petitioner between these two cities ran in a general easterly and westerly direction, the northernmost of these tracks being known as track No. 71 (Defendant's Exhibit 4, opposite R. 36; R. 42) and was known as the "regular eastbound" track (R. 15, 34-35), while the southernmost of these tracks is known as track No. 72 and is the "regular westbound" track. A train moving eastwardly, between these two cities upon these tracks, enters

a tunnel at Ninth and Poplar streets in the City of St. Louis (R. 44), emerges from that tunnel at Washington avenue (R. 44), immediately enters onto the petitioner's bridge known as the Eads Bridge, which carries the tracks across the Mississippi River, and passes from the bridge proper onto its east approach, which carries the tracks to the Relay Depot in East St. Louis (R. 44-45). At all of the places mentioned petitioner's tracks are within its interlocking switch plant. At or near the entrance to the tunnel aforementioned petitioner has an interlocking plant tower, known as "X-Office" (R. 44); at Washington avenue petitioner has another interlocking plant office known as "MS-Office" (R. 47), and at the east end of the Eads Bridge proper petitioner has another "temporary" interlocking plant office, known as "J-Office" (R. 46, 47),* and at the Relay Depot petitioner has another interlocking plant tower known as "Q-Tower" (R. 46). Petitioner's employees in these towers and offices, under the direction of petitioner's train dispatcher at the "X-Office" tower (R. 44), controlled all of the switches, signals and other devices in petitioner's interlocking plant which controlled all movements of trains upon these tracks between St. Louis and East St. Louis (R. 9, 10, 12-13, 44-47).

On the occasion here involved, and for some years prior thereto, petitioner had authorized and permitted the Receivers for the Mobile & Ohio Railroad Company (hereinafter referred to, for convenience, as the "Mobile & Ohio") to use these tracks, with petitioner's knowledge and consent, under an arrangement whereby petitioner was paid by the Mobile & Ohio compensation for such use upon the same basis as petitioner was paid by other railroads for similar use of these tracks (R. 10-12). Petitioner had rules, respecting the operation of trains over its tracks, which required persons operating those trains to comply

*This "J-Office" was, apparently, not being used on the occasion here involved (R. 47).

with such rules (R. 10), and petitioner had the right to control (R. 10, 20)—and, being in possession and control of all the signals, switches and interlocking devices, had the means to control (R. 9, 10, 12-13)—the movement of all trains operating over any of its tracks.

On the occasion here involved the respondent's intestate, Ernest F. Miller, in the course and scope of his employment by defendant, was riding upon the drawbar at the extreme rear end of the last car of one of petitioner's freight trains (R. 17, 34, 35)—consisting of some thirty cars (R. 41)—being moved eastwardly by petitioner over its main line track No. 72 from one of petitioner's yards in St. Louis, Missouri, to East St. Louis, Illinois (R. 27). After this train had crossed the Eads Bridge proper and was upon the east approach of the bridge, it was brought to a stop by reason of a signal being set against it at "Q-Tower" (R. 17, 33-34), and within two or three minutes thereafter (R. 34, 35) a passenger train of the Mobile & Ohio, consisting of a gas-electric locomotive unit and a passenger car (R. 15), and being operated by persons in the general employ of the Mobile & Ohio (R. 10, 14) in an easterly direction over petitioner's main line track No. 72 at a speed of between ten and fifteen miles an hour (R. 15-16), collided with the rear end of petitioner's freight train with such violence as to cause Miller to be fatally crushed between the two trains (R. 26, 34, 35). The weather was clear at the time of this occurrence (R. 27).

The movement of these two trains eastwardly on petitioner's main line track No. 72—the southernmost of the two tracks there—was "irregular" because eastbound trains ordinarily used track No. 71, the northernmost of those tracks (R. 15, 34).

The conductor of the Mobile & Ohio passenger train, who had just then stepped down onto the rear platform of that train and was some 120 feet from the gas-electric locomotive (R. 15), first observed the standing freight

train when the passenger train was between 180 and 200 feet to the rear of it (R. 15), and he then saw Miller standing on the drawbar on the rear end of the freight train, giving a stop signal (R. 15-16). About that same time the air was set on the passenger train by its engineer, but it did not stop in time to avoid the collision (R. 16). Under the circumstances there existing, it was not customary for the rear man on the freight train—in this instance the decedent, Miller—to get off and go back and flag any train which might be following on the same track (R. 34, 35).

The foregoing facts are wholly without dispute or controversy, and they constitute the substance of the admissions made by the petitioner (defendant), together with the testimony of the respondent's (plaintiff's) witnesses and some of petitioner's (defendant's) witnesses.

In addition to the foregoing, petitioner (defendant) offered the testimony of several witnesses that tended to show that, when its freight train entered the west end of the tunnel at Ninth and Poplar streets in St. Louis, it had a lighted red lantern on the rear end of the last car (R. 45), and the switchman on the rear end—the decedent, Miller—had a small leather paddle, called a "staff," with a number upon it, which had been given him by the yardmaster at the point at which this freight train had originated (R. 45). These devices were used for the purpose of informing petitioner's operators at the Washington avenue, or "MS," interlocking office that the entire train had passed through the tunnel, for, in the absence of the red light or the "staff" being thrown off by the rear switchman there, they would know that the rear part of the train had become detached and was still in the tunnel (R. 45). When the operators at the Washington avenue, or "MS," office would determine from observing the red light on the rear end of a train and from receiving the "staff" thrown from it, that the particular track upon

which that train was moving was clear in the tunnel, they would notify the petitioner's dispatcher at "X-Office," and, until the dispatcher at "X-Office" received such information, he would not let another train enter the tunnel on that track (R. 45). After an eastbound train passed Washington avenue, or "MS," office there was no interlocking signal or device by which a train could be stopped until it reached "Q-Tower" at the relay station in East St. Louis (R. 45-46), unless the temporary "J-Office" at the east end of the bridge proper was open—which it was not on this occasion (R. 46-47).

The petitioner's (defendant's) evidence further tended to establish that, on the occasion here involved, the petitioner's freight train and the Mobile & Ohio passenger train were being operated "irregularly," upon the orders of petitioner's dispatcher at "X-Office," in order to "relieve the congestion" caused by the number of eastbound trains being moved at that particular time (R. 47), in order to "keep things moving" (R. 48), and in order to move the trains "as rapidly as possible and causing as little delay as possible" (R. 34-35), and that the Mobile & Ohio passenger train was sent into the tunnel by defendant's dispatcher at "X-Office" "immediately" upon his being told by the operator at Washington avenue, or "MS," office that the freight train had cleared the tunnel (R. 49).

The testimony of petitioner's (defendant's) superintendent, Mr. Davis, and the exhibits offered in connection therewith, tended to establish that, from experiments conducted by him, it was shown that the engineer of the Mobile & Ohio passenger train would have had a clear and unobstructed view of the rear end of the standing freight train, and the decedent Miller upon it, while still 558 feet away from it (R. 42), and that he could have seen the standing freight train, but could not tell which track it was upon, while he was still 1,890 feet from it (R. 43).

The testimony of this witness also tended to show that, if moving at a speed of from 10 to 15 miles per hour, the Mobile & Ohio train could have been brought safely to a stop, under the existing conditions, in between 90 and 100 feet (R. 40).

Such other of the detailed facts as may be essential to an understanding of any particular point involved here will be considered in our argument upon that point.

The Trial and Subsequent Proceedings.

At the trial the case was submitted upon the res ipsa loquitur doctrine, and the jury was instructed, *inter alia*, that (R. 51):

> "* * * under the law of this case the agents and servants of the Receiver of the Mobile & Ohio Railroad Company, in charge of the passenger train mentioned in evidence, are to be regarded by you as the agents and servants of the defendant."

The jury returned a verdict in favor of the plaintiff (R. 70), and from the judgment entered thereon after remittitur ordered by the trial court (R. 71, 72), the defendant (petitioner here) duly appealed to the Supreme Court of Missouri (R. 71-76).

The Supreme Court of Missouri, in its opinion and decision upon that appeal (Miller v. Terminal R. Assn. of St. Louis [Mo. Sup.], 163 S. W. 2d 1034, not yet officially reported), ruled that the local law of Illinois, pleaded in the petition and to the effect that a lessor or licensor railroad was liable for the acts of its lessees or licensees, and that the latter, and their agents and employees, became and were the agents and servants of the former, was properly applicable to the action, and that the jury had properly been so instructed.

Petitioner now seeks review of this opinion and decision of the Supreme Court of Missouri.

SUMMARY OF THE ARGUMENT.

I.

Petitioner here has stated no sufficient reason for review by writ of certiorari in this case. The sole federal question determined by the Supreme Court of Missouri in the case is one which has heretofore been determined by this Court, and it was determined by the Supreme Court of Missouri in accord with the applicable decision of this Court.

Paragraph 5 (a) of Rule 38 of this Court;
North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591.

II.

Petitioner's counsel having, in his argument to the jury, admitted petitioner's liability (R. 64-66), petitioner cannot now change his theory and contend upon this appeal for error relating to the issue of its liability.

Oscaynan v. Arms Co., 103 U. S. 261, 26 L. ed. 539;
U. S. Shipping Board Emergency Fleet Corporation v. South Atlantic Dry Dock Company, 5 Cir., 19 F. 2d 486;
United States v. Leeburger, 2 Cir., 160 F. 651;
Wiget v. Becker, 8 Cir., 84 F. 2d 706;
Hampe v. Versen, 224 Mo. App. 1144, 32 S. W. 2d 793;
Hughes v. Eldorado Coal & Mining Co., 197 Ill. App. 259;
Arkansas City Canning Co. v. Dunston, 63 Kan. 879, 64 P. 125.

III.

Where the facts of the case are otherwise such as to make the doctrine of res ipsa loquitur applicable, that doctrine is fully applicable in cases under the Federal Employers' Liability Act, such as is the case at bar (R. 8).

Southern R. Co. v. Derr, 6 Cir., 240 F. 73;

Central R. Co. of N. J. v. Peluso, 2 Cir., 286 F. 661, certiorari denied 261 U. S. 613, 43 S. Ct. 359, 67 L. ed. 827;

Baltimore & O. R. Co. v. Kast, 6 Cir., 299 F. 419, certiorari denied 266 U. S. 613, 45 S. Ct. 95, 69 L. ed. 468;

Erie R. Co. v. Murphy, 2 Cir., 9 F. 2d 525;

Cochran v. Pittsburgh & L. E. R. Co. (D. C. Ohio), 31 F. 2d 769;

Chesapeake & O. R. Co. v. Smith, 6 Cir., 40 F. 2d 111, certiorari denied 282 U. S. 856, 51 S. Ct. 32, 75 L. ed. 758;

Lowery v. Hocking Valley R. Co., 6 Cir., 60 F. 2d 78;

Carpenter v. Baltimore & O. R. Co., 6 Cir., 109 F. 2d 375;

Eker v. Pettibone, 7 Cir., 110 F. 2d 451;

Benner v. Terminal R. Assn. (Mo. Sup.), 156 S. W. 2d 657, certiorari denied 315 U. S. 813, 86 L. ed. (Advance Sheets) 668.

IV.

Where the evidence establishes, as it did in this case, that a collision between two trains upon the petitioner railway company's tracks was the cause of the decedent's death, those facts alone ordinarily bring the case within the doctrine of res ipsa loquitur and establish a prima facie case of petitioner's negligence.

Lee v. Kansas City Southern R. Co., 8 Cir., 220 F. 863;

Kirkendall v. Union Pacific R. Co., 8 Cir., 200 F. 197;

Rouse v. Hornsby, 8 Cir., 67 F. 219;

Greinke v. Chicago C. R. Co., 234 Ill. 564, 85 N. E. 327;

North Chicago St. R. Co. v. Cotton, 140 Ill. 486, 29 N. E. 899;

McGoffin v. Missouri Pacific R. Co., 102 Mo. 540, 15 S. W. 76;

Magrane v. St. Louis & S. R. Co., 193 Mo. 119, 81 S. W. 1158;

Chlanda v. St. Louis Transit Co., 213 Mo. 244, 112 S. W. 249;
Price v. Metropolitan St. Ry. Co., 220 Mo. 435, 119 S. W. 932.

V.

Notwithstanding that the passenger train in the case at bar was being operated by persons in the general employ of the Receiver for the Mobile & Ohio Railroad Company, the petitioner was in "exclusive control" of all the instrumentalities here involved, so as to make the doctrine of res ipsa loquitur fully applicable, because:

(A) The requirement of the res ipsa loquitur doctrine that the instrumentalities under the control of the defendant refers to the right of control, and does not mean, and is not limited to, actual physical control; and the evidence establishes petitioner's right of control over all of the instrumentalities involved, including the Mobile & Ohio passenger train.

38 Am. Jur., p. 997, Sec. 300;
45 C. J., p. 1216, Sec. 781;
McCloskey v. Koplar, 329 Mo. 527, 46 S. W. 2d 557;
Pandjiris v. Oliver Cadillac Co., 339 Mo. 711, 98 S. W. 2d 969;
Herries v. Bond Stores, Inc., 231 Mo. App. 1053, 84 S. W. 2d 153;
Hart v. Emery-Bird-Thayer D. G. Co., 233 Mo. App. 312, 118 S. W. 2d 509;
Van Horn v. Pacific Roofing & Ref. Co., 27 Cal. App. 105, 148 P. 951;
Ciacci v. Wooley, 33 Hawaii 247.

(B) In legal effect, the persons operating the Mobile & Ohio passenger train were the agents and servants of petitioner, so that petitioner had actual physical control over that train.

(1) Under the local law in Illinois, the place where this cause of action concededly arose (R. 8, 27), which was pleaded in the petition (R. 2-3), this petitioner, as the owner of the railroad upon which this collision occurred, was liable for an injury resulting from the use of its tracks by its lessee or licensee, the Mobile & Ohio, and the Mobile & Ohio and its agents and employees became and were the agents and servants of the petitioner.

Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. 599;
Chicago & E. R. Co. v. Meech, 163 Ill. 305, 45 N. E. 290;
Anderson v. West Chicago S. R. Co., 200 Ill. 329, 65 N. E. 717;
Chicago & G. T. R. Co. v. Hart, 209 Ill. 414, 70 N. E. 654;
Chicago & E. I. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 478;
Armstrong v. Chicago & W. I. R. Co., 350 Ill. 426, 183 N. E. 478, certiorari denied 289 U. S. 724, 53 S. Ct. 523, 77 L. ed. 1475.

(2) This Court, the lower federal courts, the Illinois courts, the Missouri courts, and the courts of other states, have all ruled that such a rule of local law is applicable in cases under the Federal Employers' Liability Act, such as is the case at bar, under circumstances similar to those in the case at bar.

North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591;
Kansas City Southern R. Co. v. Nectaux, 5 Cir., 26 F. 2d 317, certiorari denied 278 U. S. 621, 49 S. Ct. 24, 73 L. ed. 542;
Armstrong v. Chicago & W. I. R. Co., 350 Ill. 426, 183 N. E. 478, certiorari denied 289 U. S. 724, 53 S. Ct. 523, 77 L. ed. 1475;
Sheehan v. Terminal R. Assn., 336 Mo. 709, 81 S. W. 2d 305;

Sheehan v. Terminal R. Assn., 344 Mo. 586, 127 S. W. 2d 657, certiorari denied 308 U. S. 581, 60 S. Ct. 102, 84 L. ed. 487;
Spaw v. Kansas Terminal R. Co., 198 Mo. App. 552, 201 S. W. 927;
Wegman v. Great Northern R. Co., 189 Minn. 325, 249 N. W. 422;
Barnes v. Red River & G. R. Co., 14 La. App. 188, 128 So. 724.

(3) Even should the rule of law announced in the decisions of the federal courts, rather than the rule in Illinois, be deemed to apply, the result would be the same, because the two rules are identical.

Illinois Central R. Co. v. Barron, 5 Wall. (72 U. S.) 90, 18 L. ed. 591;
Illinois Central R. Co. v. Sheegog, 215 U. S. 308, 317, 30 S. Ct. 101, 54 L. ed. 735;
Welden Nat'l Bank v. Smith, 2 Cir., 86 F. 398;
Central Trust Co. v. Denver & R. G. R. Co., 8 Cir., 97 F. 239, certiorari denied 176 U. S. 683, 20 S. Ct. 1025, 44 L. ed. 638;
Denver & R. G. R. Co. v. Roller, 9 Cir., 100 F. 738;
Northern Pacific R. Co. v. Mentzer, 9 Cir., 214 F. 10.

VI.

(A) The fact is that the petitioner here is a terminal railroad company, and not a mere union station company organized under Sections 5251 and 5252, Revised Statutes of Missouri 1939, and the fact that it is a terminal railroad company does not in the least affect its liability under the rule that a lessor or licensee railroad is liable for the acts of its lessees or licensees. Relief from that rule can be obtained only by express statutory authority.

Clark v. Atchison, T. & S. F. R. Co., 319 Mo. 865, 6 S. W. 2d 954;

Chicago & G. T. R. Co. v. Hart, 209 Ill. 414, 70 N. E. 654;
North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591.

(B) In point of fact, irrespective of the mode of its incorporation, the petitioner was operating as an interstate common carrier by railroad so as to make the Federal Employers' Liability Act and the general rules of law relating to railroads applicable to it. At the very moment of decedent's death petitioner's employees, including decedent, were moving one of its freight trains from St. Louis, Missouri, to East St. Louis, Illinois.

VII.

(A) The purported defense that the use of petitioner's tracks by the Mobile & Ohio was "involuntary" on petitioner's part, and that petitioner is thereby relieved of liability under the general rule respecting a lessor or licensor railroad's liability for the act of its lessees or licensee, is not available to the petitioner here because:

(1) Such purported defense is an affirmative defense which was not pleaded by petitioner.

Merchants' Mutual Insurance Co. v. Baring, 20 Wall. (87 U. S.) 159, 22 L. ed. 250;
Nulsen v. National Pigment & Chemical Co., 346 Mo. 1246, 145 S. W. 2d 410.

(2) There is no evidence in the record to support any such defense.

Merchants' Mutual Insurance Co. v. Baring, 20 Wall. (87 U. S.) 159, 22 L. ed. 250;
State ex rel. Rothrum v. Darby, 345 Mo. 1002, 137 S. W. 2d 532.

(B) In any event, there being no express statutory authority relieving petitioner of the liability cast upon a lessor or licensor railroad for the acts of its lessees and licensees, the petitioner remains within the general rule.

North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591;

Chicago and G. T. R. Co. v. Hart, 209 Ill. 414, 70 N. E. 654.

ARGUMENT.

I.

At the very outset of our argument we desire to point out that the petitioner here has failed to state any sufficient reason for granting review of this case on writ of certiorari.

It is elementary, and announced by paragraph 5 (a) of Rule 38 of this Court, that review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor, such as where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with the applicable decisions of this Court.

The only federal question involved in this case which was determined by the Supreme Court of Missouri is whether a dominant rule of local law, which makes a lessor or licensor railroad liable for the acts of its lessees or licensees and constitutes the servants and employees of the lessees or licensees the agents and servants of the lessor or licensor, is applicable to cases under the Federal Employers' Liability Act (45 U. S. C. A., §§ 51-60). The Supreme Court of Missouri ruled that question in the affirmative upon the authority of North Carolina Railroad Company v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591, which is squarely in point, and which has never been weakened nor departed from in the slightest, so far as we have been able to determine. Accordingly, it is apparent at the outset that the Missouri court has decided a federal question which heretofore has been determined by this Court, and has decided it in accord with the applicable decision of this Court, so there is, therefore, no sufficient ground for review of the Missouri court's opinion and decision by writ of certiorari.

However, let us here point out that, as we will hereinafter discuss at greater length (post, pp. 31-32), even if the Missouri court was in error in holding that the dominant rule of local law was applicable, and even if the rule of law announced in the federal decisions should have been applied, the result would have been the same, because the two rules of law are identical, and review of the Missouri court's opinion and decision by writ of certiorari would, therefore, serve no useful purpose.

The fact of the matter is, we most respectfully submit, that petitioner seeks review of the Missouri court's opinion and decision not because petitioner has any legally sufficient reason therefor, but merely because petitioner is dissatisfied with that opinion and decision.

II.

Before undertaking our discussion of the various questions presented by petitioner's petition for writ of certiorari and brief in support thereof, we are constrained to point out another matter which, we believe and most respectfully submit, precludes consideration of any error alleged by petitioner as a ground for review.

Without setting it out here verbatim, we direct the attention of this Honorable Court to the argument made to the jury by petitioner's counsel, Mr. Sheppard, at the close of the trial below (R. 64-66). That argument was, we submit, a plain, unambiguous and unqualified admission of petitioner's (defendant's) liability to this respondent (plaintiff) for damages for the death of her decedent, made in an attempted display of fairness for the purpose of attempting to minimize the amount of the verdict by seeking to gain favor with the jury through such display of fairness coupled with a plea for equal fairness on the part of the jury. Can petitioner reverse the position taken by its counsel at the trial, adopt a new set of theories of

nonliability, and attempt to secure a review upon those theories which, in view of the admission of liability, had no place in the trial of the case? We respectfully submit not!

Certainly, at this late date no citation of or quotation from the authorities is necessary to support the principle that in an appellate court a party cannot assume an attitude inconsistent with that taken by him at the trial, but he will be restricted to the theory adopted by him below. As part and parcel of that principle, the rule has become settled that a party is bound by a statement of facts, or an admission, made by his counsel in open court, so as to preclude consideration of any contention which is inconsistent with such a statement or admission. In Oscaynan v. Arms Co., 103 U. S. 261, 263, 26 L. ed. 539, this Honorable Court said:

> "The power of the court to act in the disposition of a trial upon facts conceded by counsel is as plain as its power to act upon the evidence produced. * * * In the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. * * * Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof."

In U. S. Shipping Board Emergency Fleet Corp. v. South Atlantic Dry Dock Co., 5 Cir., 19 F. 2d 486, 489, the Court said:

> "A fact **or conclusion** admitted by a party in the trial court for the purposes of the trial is not open to be controverted or put in issue by that party in the appellate court." (Emphasis ours.)

In United States v. Leeburger, 2 Cir., 160 F. 651, one of the syllabi, which is fully supported by the opinion, reads:

> "A question of fact cannot be raised on appeal which was conceded in the argument in the court below."

See, also, Wiget v. Becker, 8 Cir., 84 F. 2d 706, 709, 711; Hampe v. Versen, 224 Mo. App. 1144, 32 S. W. 2d 793; Hughes v. Eldorado Coal & Mining Co., 197 Ill. App. 259; Arkansas City Canning Co. v. Dunston, 63 Kan. 879, 64 P. 1025.

Accordingly, we most respectfully submit that since petitioner's counsel made a clear and unqualified admission of petitioner's liability in his argument to the jury at the trial, petitioner is here bound by such admission so as to preclude review of its present contentions of nonliability.

III AND IV.

Notwithstanding the firmness of our convictions that, because of what we have heretofore said, certiorari should not be granted in this case, we feel that prudence requires that we answer petitioner's contentions upon the issue of its liability, in order to further demonstrate the futility of further review of this case. In answering these contentions of petitioner we shall not follow the exact order in which they are presented by petitioner, but shall discuss the matters involved in an order in which we consider more convenient and understandable.

Bearing in mind that respondent's (plaintiff's) case was one which was pleaded, proven and submitted under the doctrine of res ipsa loquitur, let us first point out two legal propositions which are well established:

1. The doctrine of res ipsa loquitur may be invoked in an action under the Federal Employers' Liability Act, as is the case at bar, where the facts of the case are such as to make it a proper one for the application of that doc-

trine. All of the authorities cited under point III of our summary or argument in this case (ante, pp. 9-10) so hold.

2. Ordinarily, where a case involves a collision between two trains upon the same track, the fact of the collision makes a prima facie case of negligence, and the case is a proper one for the application of, and within, the doctrine of res ipsa loquitur. All of the authorities cited under point IV of our summary of argument herein (ante, pp. 10-11) so hold.

V.

The petitioner, while tacitly conceding the two propositions just stated, contends, in substance, that it is not liable in this case under the doctrine of res ipsa loquitur because, it asserts, it did not have exclusive control over the instrumentalities producing the injury, and, in particular, over the Mobile & Ohio passenger train, and that, therefore, the fact of the collision, while making a prima facie case of negligence, does not point to the negligence of petitioner as the proximate cause of the collision. This contention is based upon petitioner's thought that, in the absence of a "conventional" relationship between petitioner and the engineer of the Mobile & Ohio train, petitioner could not be liable for such engineer's acts, coupled with the further thought that the sole cause of the injury was the negligence of the engineer.

While the respondent does not concede that the sole cause of the death of her intestate was negligence on the part of the engineer operating the Mobile & Ohio train, and while respondent is convinced that the evidence was sufficient to permit a finding that negligence on the part of some of petitioner's regular employees in charge of and operating petitioner's interlocking plant concurred and cooperated in bringing about the death of her intestate so as to fix liability upon petitioner, yet the basic position of

respondent is that the petitioner had exclusive control over all the instrumentalities here involved for two reasons, viz.: (1) Even if the petitioner did not have actual physical control of the Mobile & Ohio train in that it did not have its regular employees operating that train, it had the right of control over that train, as well as over all the other instrumentalities here involved, which was sufficient to meet the requirements of the res ipsa loquitur doctrine, and (2) under the applicable principles of law, the persons in charge of and operating the Mobile & Ohio passenger train were the agents and servants of the defendant, so that defendant had actual physical control of that train, as well as actual physical control of all the other instrumentalities involved.

(A) Petitioner Had the "Right of Control" Over All the Instrumentalities Involved.

In 38 Am. Jur., p. 997, Sec. 300, in speaking of the requirement of the res ipsa loquitur doctrine that all of the instrumentalities involved must be under the control of the defendant, it is said:

> "The requirement that the instrumentalities be under the management and control of the defendant **does not mean, or is not limited to actual physical control, but refers rather to the right of control** at the time of the accident." (Emphasis ours.)

And this quotation has ample support in the authorities (Cf. McCloskey v. Koplar, 329 Mo. 527, 46 S. W. 2d 557, 560; Pandjiris v. Oliver Cadillac Co., 339 Mo. 711, 98 S. W. 2d 969, 973; Herries v. Bond Stores, Inc., 231 Mo. App. 1053, 84 S. W. 2d 153, 156-157; Hart v. Emery-Bird-Thayer D. G. Co., 233 Mo. App. 312, 118 S. W. 2d 509, 511; Van Horn v. Pacific Ref. & Roofing Co., 27 Cal. App. 105, 148 P. 951, 953; Ciacci v. Wooley, 33 Hawaii 247, 35 C. J., p. 1216, § 781).

The reason for the rule is aptly stated in Van Horn v. Pacific Ref. & Roofing Co., supra, wherein it was said:

> "The rule * * * to the effect that the exclusive control and management of the appliances causing the injury must be shown to have been in the defendant, must be taken to refer to the right of such control; otherwise * * * the doctrine of res ipsa loquitur could seldom if ever be given application."

What are the facts in the case at bar with reference to petitioner's right of control over the instrumentalities which produced the injuries to, and death of, the respondent's intestate, and particularly over the Mobile & Ohio train? It was, and is, admitted and conceded that petitioner had sole and exclusive control over the petitioner's tracks upon which the two trains were being operated, as well as over all the appliances used in the operation of those tracks (R. 9); that the petitioner had sole and exclusive control over, and charge of the operation of, all of the signals and switches which governed and controlled the movements of trains over and upon petitioner's tracks in petitioner's interlocking plant in which this collision occurred (R. 12); that the petitioner had "actual physical control" over, and was operating through persons in its general employ, the freight train upon which deceased was working when he was killed (R. 9); that the petitioner had various rules respecting the operation of trains over its tracks, which applied to all trains which were operated over those tracks, whether so operated by persons in the general employment of petitioner or by other persons under an arrangement with petitioner, and which rules "require persons operating those trains to comply with those rules" (R. 10); that petitioner had the right to control the movements of all trains which were operated over its tracks, and to control when any of such trains should or should not use any

particular track (R. 10); and that the passenger train involved in this collision was being operated, by persons in the general employ of the Receivers of the Mobile & Ohio Railroad Company, over petitioner's tracks, with the knowledge and consent of petitioner, and under an arrangement of long standing between petitioner and such Receivers, whereby petitioner was paid by such Receivers for such use of the tracks (R. 10-12).

In addition to the foregoing admissions there was evidence offered by petitioner showing that, by the aforementioned rules of petitioner, it reserved to itself the method and manner of operation of all trains operated over and upon its tracks, including even the speed of such trains, and there was undisputed and uncontradicted testimony of the conductor in charge of the Mobile & Ohio passenger train, who was offered as a witness for respondent, that the persons in charge, and the movements, of the Mobile & Ohio passenger train were under petitioner's control while such train was on petitioner's property, such conductor's testimony in that connection being as follows (R. 20):

> "Q. Now, are you examined by the Terminal, examined from time to time by the Terminal Railroad Association on the Terminal Railroad Association's rules? A. We are.
>
> Q. And you are subject, while on their property, to their rules, are you? A. Exactly.
>
> Q. In other words, **they control your movements on their property** and you are subject to their rules; that is right, isn't it? A. Yes, sir." (Emphasis supplied.)

We cannot understand how there could be made a clearer or better showing of petitioner's right of control over the instrumentalities involved in this case, and particularly over the Mobile & Ohio train, than is made by the foregoing facts. Those facts not only demonstrate petitioner's conceded right of control and actual physical

control over all of the instrumentalities involved, excepting the Mobile & Ohio train, but they clearly demonstrate that the petitioner had the absolute right of control over every detail of the movement of the Mobile & Ohio train upon petitioner's tracks. By its conceded physical control over all the various switches in its tracks petitioner controlled whether the Mobile & Ohio train should or should not use any particular track; by its conceded physical control over all the various signals controlling the movement of trains upon its various tracks petitioner controlled the time when the Mobile & Ohio train could and could not move upon any particular track, as well as the direction of any such movement; and by its rules and regulations, which were concededly controlling upon the persons in charge of the Mobile & Ohio train, the petitioner had the right of control over the manner of operation of that train, even down to such minor details as regulating its speed at various places upon petitioner's tracks. Accordingly, we most respectfully submit that the petitioner had the complete right of control over the Mobile & Ohio passenger train, as well as over all the other instrumentalities here involved, so as to make petitioner responsible for the method and manner of the operation of that train, so as to make the fact of the collision between the two trains point to the negligence of the defendant as the proximate cause of the accident, and so as to make the doctrine of res ipsa loquitur fully applicable.

(B) In Legal Effect, the Persons Operating the Mobile & Ohio Train Were Agents and Servants of Petitioner, So That Petitioner Had Actual Physical Control Over That Train.

The principles of law applicable to the facts of this case establish the status of the persons operating the Mobile & Ohio train as agents and servants of the petitioner, so

as to put petitioner in actual physical control of that train, and cast upon petitioner liability for any negligent operation thereof.

The respondent (plaintiff) pleaded in her petition (R. 2-3) the rule of law of Illinois announced in several decisions of the Supreme Court of that state,* to the effect that, where the owner of a railroad authorizes or permits another to use its tracks and an injury results from negligent or unlawful operation, the owner and user are jointly and severally liable to the person injured, and the user and his agents and servants become and are the agents and servants of the owner. In the first of these cases, Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. 559, 560-561, it was said:

> "* * * where injury results from the negligence or unlawful operation of the railroad, whether by the corporation to which the franchise is granted, or by another corporation, or by individuals, whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable (citing many cases). * * * The public may look for indemnity for injury resulting from the wrongful or unlawful operation of the road to that corporation to which they have granted a franchise, and thus delegated a portion of the public service; and for this purpose **the company whom it permits to use its tracks, and its servants and employees, will be regarded as the servants and agents of the owner company.**" (Emphasis ours.)

The other Illinois decisions pleaded in plaintiff's petition are to like effect, as a most cursory examination of them will show, and we refrain from discussing them at length here because your petitioner tacitly, if not actually, con-

*Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. 559; Chicago & Erie R. Co. v. Meech, 163 Ill. 305, 45 N. E. 290; Anderson v. West Chicago St. R. Co., 200 Ill. 329, 65 N. E. 717; Chicago & G. T. R. Co. v. Hart, 209 Ill. 414, 70 N. E. 654; Chicago & E. I. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050; Armstrong v. Chicago & W. I. R. Co., 350 Ill. 426, 183 N. E. 478, certiorari denied 289 U. S. 724, 53 S. Ct. 523, 77 L. ed. 1475.

cedes the Illinois law to be as pleaded and contended for by respondent.

Is this rule of local law applicable to cases under the Federal Employers' Liability Act? Petitioner contends that it is not—it being petitioner's position that, since this action is one under the Federal Employers' Liability Act, it is to be governed and controlled by the applicable principles of law as announced and declared in the decisions of the federal courts, rather than those of the courts of the state in which the cause of action arose, and that, therefore, the rule of law announced in the Illinois decisions is not applicable here. It is the respondent's position that, while no state statute or local rule of law which is repugnant to the terms of the Federal Employers' Liability Act can be used to modify or defeat that act, yet it is equally true that dominant rules of local law and state statutes which do not contravene the terms of the federal act are controlling in many instances. This is as it should be. The dominant rule of local law of the State of Illinois here involved does not conflict with the letter or the spirit of the Federal Employers' Liability Act; that rule simply made the lessees or licensees of the petitioner—that is to say, the Receivers of the Mobile & Ohio Railroad Company—and the employees of such lessee or licensee, the agents and servants of the petitioner while operating trains over petitioner's tracks. Certainly that rule of law, or state statute to like effect, cannot be set aside for no good reason. That rule of law, like any other rule of law, was binding upon both of these railroads, just as effectively as if there were a written contract between the two railroads to the same effect as the rule of local law. If there had been offered in evidence a written contract between the Receivers of the Mobile & Ohio Railroad Company and the petitioner, stating that it was agreed between them that the said Receivers and their employees would for all purposes be deemed the agents and servants

of the petitioner when operating trains upon petitioner's tracks, that contract would have had no greater or less dignity than the rule of local law in Illinois, and the application of such a contract could not be denied in an action brought under the Federal Employers' Liability Act. Likewise, the application of such a rule of local law cannot be denied in such a case.

The leading case upon this point is the decision in North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591, a case which, so far as we have been able to determine, has never been weakened as an authority. In that case this Honorable Court, in holding the Federal Employers' Liability Act to be applicable, applied a rule of local law announced by the courts of the State of North Carolina which, like the Illinois rule involved in the case at bar, made a lessor or licensor railroad liable for the acts of its lessees and licensees, and their servants and employees. In reversing the ruling of the state court which had held the Federal Employers' Liability Act not to be applicable, this Honorable Court said (232 U. S., l. c. 257-258):

> "The court based its decision that the Federal act did not apply, in part upon the ground that the North Carolina Railroad is not an interstate railroad * * *. The responsibility of the lessor for all acts of negligence of the lessee occurring in the conduct of business on the lessor's road, as established by the same court in Logan v. Railroad, 116 No. Car. 940, was recognized—indeed reasserted. 'But,' it was said, 'that is because a railroad corporation cannot escape its responsibility by leasing its road. It is still liable for its lessee's acts of commission and omission, whether they occur in interstate or intrastate commerce, although the lessor is not actually engaged in either.' 156 No. Car. 500.
>
> "It is plain enough, however, that the effect of the rule thus laid down, especially in view of the grounds upon which it is based, is, that **although a railroad**

> **lease as between the parties may have the force and effect of an ordinary lease, yet with respect to the railroad operations conducted under it, and everything that relates to the performance of the public duties assumed by the lessor under its charter, such a lease—certainly so far as concerns the rights of third parties, including employes as well as patrons—constitutes the lessee the lessor's substitute or agent, so that for whatever the lessee does or fails to do, whether in interstate or in intrastate commerce, the lessor is responsible.** This being the legal situation under the local law, it seems to us that it must and does result, in the case before us, that the lessor is a 'common carrier by railroad engaging in commerce between the States,' and that the deceased was 'employed by such carrier in such commerce,' within the meaning of the Federal act * * *." (Emphasis ours.)

Following the decision in the Zachary case, supra, the lower federal courts have recognized the applicability of a rule of local law, such as is here involved, in cases under the Federal Employers' Liability Act.

A situation identical with that presented in the case at bar arose in Kansas City Southern R. Co. v. Nectaux, 5 Cir., 26 F. 2d 317, in which the plaintiff, an engineer in the employ of the defendant, was injured while engaged in interstate commerce as the result of the train which he was operating upon defendant's road being collided with by a negligently-operated train of the Gulf Coast Lines, which was being operated over defendant's tracks by persons in the general employ of the Gulf Coast Lines under a joint trackage right agreement between the two railroads. Plaintiff brought suit against his employer under the Federal Employers' Liability Act and recovered a judgment, and in affirming that judgment the Circuit Court of Appeals for the Fifth Circuit said (26 F. 2d, l. c. 319):

> "It is settled that a railroad is responsible to a passenger for damages occasioned by the negligence of a licensee using its tracks. Illinois Central R. R.

v. Barron, 5 Wall. 90, 18 L. Ed. 591. The decisions are not harmonious in applying this rule to an employee, but in Louisiana an employee of a railroad permitting another to use its tracks jointly may recover from his employer for injuries caused by the negligence of the agents of the licensee * * *. It is not necessary that the technical relation of lessor and lessee, in the sense that the entire operation of the road is turned over to the lessee, should exist. The rule is the same if there is contemporaneous joint usage of the road. Ingram v. La. & N. W. R. Co., 128 La. 933, 55 So. 580; Taylor v. La. & N. W. R. Co., 129 La. 113, 55 So. 732; Bailey v. La. & N. W. R. Co., 129 La. 1029, 57 So. 325. **A rule of local law imposing liability may be enforced in suits under the Federal Employers' Liability Act.** North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914 C, 159." (Emphasis ours.)

The foregoing decision is not only squarely in point with the case at bar, but review of that decision by writ of certiorari was denied by this Honorable Court in Kansas City Southern R. Co. v. Nectaux, 278 U. S. 621, 49 S. Ct. 24, 73 L. ed. 542.

Also, following the decision of this Court in the Zachary case, supra, the Illinois Supreme Court, in Armstrong v. Chicago & W. I. R. Co., 350 Ill. 426, 183 N. E. 478, applied the Illinois common-law rule making a lessor railroad liable for the acts of its lessees and their servants and employees, in an action under the Federal Employers' Liability Act. In that case the action was brought against the Chicago & W. I. R. Co. and the Chicago & E. I. R. Co. for the death of plaintiff's intestate, who was a conductor in the employ of the former and who had been killed as a result of negligence on the part of the latter in its operation of trains and cars on its tracks over which the train upon which the deceased was working when killed was being operated under an arrangement between the two railroad companies. The Illinois Supreme Court, in holding

both railroad companies liable, said (183 N. E., l. c. 480-481):

> "The principle is thoroughly established that where an injury results from the negligent or unlawful operation of a railroad, whether by the owner or by another whom the owner authorizes or permits to use its tracks, both railroad companies are liable to respond in damages to the person injured * * *. The lessor and lessee are not only jointly and severally liable to the general public, but the rule embraces employees * * * and, although the relation of lessor and lessee is not shown to exist, the rule applies to cases where the owner permits another railroad to use its tracks * * *. The C. & E. I. Ry. Co. was engaged in interstate commerce while using the switch yards of the C. & W. I. R. Co. and **under the rule both defendants are liable under the Federal Employers' Liability Act.** North Carolina Railroad Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591, Ann. Cas. 1914 C, 159." (Emphasis supplied.)

Review of the last-mentioned decision by writ of certiorari was, also, denied by this Honorable Court in 289 U. S. 724, 53 S. Ct. 523, 77 L. ed. 1475.

In Missouri, where the instant case was tried, there are statutes* which are identical with the common-law rule in Illinois making the agents and servants of a lessee or licensee railroad the agents and servants of the lessor or licensor railroad. These statutes have been held to be applicable in actions under the Federal Employers' Liability Act by the Missouri courts, so as to make a lessor or licensor railroad liable to its employees for injuries sustained as the result of negligence of a lessee or licensee railroad (Cf. Sheehan v. Terminal R. Assn. of St. Louis, 336 Mo. 709, 81 S. W. 2d 305; Sheehan v. Terminal R. Assn. of St. Louis, 344 Mo. 586, 127 S. W. 2d 657, certiorari denied 308 U. S. 581, 60 S. Ct. 102, 84 L. ed. 487; Spaw v.

*Now Sections 5162 and 5163, R. S. Mo. 1939.

Kansas City Terminal R. Co., 198 Mo. App. 552, 201 S. W. 927, 929-930).

The courts of other states have, likewise, ruled that a rule of local law making a lessor or licensor railroad liable for the acts of its lessees or licensees, and their servants and employees, is applicable in actions under the Federal Employers' Liability Act, in cases where the facts were substantially identical to those in the case at bar (Cf. Wegman v. Great Northern R. Co., 189 Minn. 325, 249 N. W. 422, 423; Barnes v. Red River & G. R. Co., 14 La. App. 188, 128 So. 724).

From the foregoing decisions it is quite apparent that the Illinois rule making a lessor or licensor railroad liable for the acts of its lessees or licensees, and their servants and employees, is properly applicable to the case at bar and that, by the application of that rule to the facts in this case, the persons operating the Mobile & Ohio train were given the status of agents and servants of the petitioner so as to put petitioner in full control of the Mobile & Ohio train and liable under the Federal Employers' Liability Act to any of petitioner's employees negligently injured thereby.

Furthermore, and in any event, if the rule of the federal courts should be applied in this connection, rather than the rule of the Illinois courts, that would not alter one iota what we have hereinbefore said, because, as is apparent from an examination of the decisions of this Honorable Court and of the lower federal courts set out in the footnote below,* the federal courts have long been committed to the doctrine, which is identical with that announced by

*Illinois Central R. Co. v. Barron, 5 Wall. (72 U. S.) 90, 18 L. ed. 591, commented upon at length in Southern R. Co. v. Hussey, 8 Cir., 42 F. 2d 70, 72, and most recently cited in Southern R. Co. v. Hussey, 283 U. S. 136, 139, 51 S. Ct. 367, 75 L. ed. 908, 911; Illinois Central R. Co. v. Sheegog, 215 U. S. 308, 317, 30 S. Ct. 101, 54 L. ed. 735; Welden National Bank v. Smith, 2 Cir., 86 F. 398, 401; Central Trust Co. v. Denver & R. G. R. Co., 8 Cir., 97 F. 239, 242, certiorari denied 176 U. S. 683, 20 S. Ct. 1025, 44 L. ed. 638; Denver & R. G. R. Co. v. Roller, 9 Cir., 100 F. 738, 745; Northern Pacific R. Co. v. Mentzer, 9 Cir., 214 F. 10, 15.

the Illinois courts, that a lessor or licensor railroad is liable for the acts of its lessees or licensees, and their servants and employees, in railroad operations upon the former's railroad.

Petitioner's Contentions and Authorities Discussed.

Petitioner here seeks to avoid the effect of what we have just said by asserting that there must be a "conventional" relationship of employer and employee between the carrier and *the person causing the injury* in order for the Federal Employers' Liability Act to be applied in a case where a "conventional" employee of the carrier is injured or killed. In support of this assertion petitioner relies upon the decisions in Robinson v. Baltimore & Ohio R. Co., 237 U. S. 84, 35 S. Ct. 491, 59 L. ed. 849; Chicago & Alton R. Co. v. Wagner, 239 U. S. 452, 36 S. Ct. 135, 60 L. ed. 379, and Hull v. Philadelphia and Reading R. Co., 252 U. S. 475, 40 S. Ct. 358, 64 L. ed. 670. None of these decisions, however, involve the question of the relationship which must exist between the carrier and *the person causing the injury* in Federal Employers' Liability cases. Those decisions deal only with the relationship which must exist between the carrier and *the person injured or killed* in order for the Federal Employers' Liability Act to be applicable; they are otherwise distinguishable from the case at bar, as shall presently appear, and, even if they rule that a "conventional" relationship must exist between a carrier and the person injured or killed—which we do not concede—they in effect are overruled by later decisions of this Honorable Court.

The decision in Robinson v. Baltimore & Ohio R. Co., supra, relied upon by petitioner, is not in point, because in that case the *plaintiff was not an employee of any railroad,* either in fact or in law, but was a Pullman porter,

and the Federal Employers' Liability Act was correctly held, because of its specific terms, to be limited in its application to railroad employees.

The decision in Chicago & Alton R. Co. v. Wagner, supra, is not in point for the reason that the action there was not predicated by plaintiff upon any status of his as an employee of the defendant so as to be entitled to the benefits of the Federal Employers' Liability Act, and this is clearly shown by the opinion, where, in discussing the inapplicability of the Federal Employers' Liability Act to the case, this Court said (239 U. S., l. c. 456):

> "**The action was not brought under that act.** There were allegations in the original declaration to the effect that Wagner at the time of the injury was engaged in interstate commerce as an employee of the Burlington company, but it seems to have been agreed upon the trial that the action was not governed by the Federal statute; and this indeed was manifest, as the Burlington company was not a party to the action and the Alton company was not the plaintiff's employer. Robinson v. Balt. & Ohio R. R., 237 U. S. 84, 91. **It was tried as a common-law action on the case.**" (Emphasis ours.)

A most casual reading of the decision in Hull v. Philadelphia & Reading R. Co., supra, will readily distinguish that case from the case at bar. In that case it was contended that Hull, the plaintiff's decedent, at the time of his death was in the employ of the Philadelphia & Reading R. Co., although it was conceded that at the same time he was in the general employment of the Western Maryland Railway Co. This contention was based upon the fact that the two railroads above mentioned had entered into a contract with reference to their respective employees. The only question in the case was whether or not Hull, at the time he met his injury and death, was, *by vir-*

tue of this contract between the two railroads, employed by the defendant, Philadelphia & Reading R. Co. This Honorable Court held that Hull was not an employee of the Philadelphia & Reading R. Co., and that the contract between the railroad companies did not make him such an employee, and that, accordingly, the Federal Employers' Liability Act did not apply because there was no relationship of employee and employer between the parties to the action. In the case at bar, however, there never has been, and cannot be, any dispute about the fact that the deceased, Ernest F. Miller, was at all times in the employ of the petitioner, Terminal Railroad Association of St. Louis, and was at the time of his injury engaged in the course and scope of his employment and engaged in the furtherance of interstate commerce for the petitioner. It is, however, interesting to note that the decision in the Hull case, supra, fully supports our contention that a rule of local law may control the liability in a case brought under the Federal Employers' Liability Act. The Hull case makes it clear that whenever a rule of local law, such as is here involved, does exist, it will be recognized and applied in an action brought under the Federal Employers' Liability Act, for this Court in the Hull case distinctly says (252 U. S., l. c. 480):

> "North Carolina R. R. Co. v. Zachary, 232 U. S. 248, is cited, but is not in point, **since in that case the relation of the parties was controlled by a dominant rule of local law,** to which the agreement here operative has no analogy." (Emphasis ours.)

Now, even if the decisions relied upon by petitioner may be said to hold that there must be a "conventional" relationship of employer and employee between the carrier and the person injured or killed in order for the Federal Employers' Liability Act to be applicable—which we do not concede—those decisions are not only not in point here,

but they are out of harmony with the earlier decision in North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591, and the other cases hereinbefore relied upon by this respondent, and they are in that respect in effect overruled by the later decision of this Honorable Court in Baltimore & O. S. W. R. Co. v. Burtch, 263 U. S. 540, 44 S. Ct. 165, 68 L. ed. 433. A "conventional" relationship of employer and employee is, of course, one where one person is working for another under an express agreement, compact, stipulation or contract, whereby the latter has agreed to compensate the former for his services. But this Court, in Baltimore & O. S. W. R. Co. v. Burtsch, supra, clearly held that a bystander, who was at the time of his injury assisting in unloading heavy freight at the request of the conductor of the railroad company's train, was for the time being an employee of the railroad and entitled to the benefits of the Federal Employers' Liability Act as such. Obviously, the relationship of employer and employee was there implied by operation of law, and was not a "conventional" one, and obviously, too, in the case at bar, the relationship of principal and agent, or of master and servant, between petitioner and the engineer of the Mobile & Ohio train was implied by operation of the rule of local law in Illinois—or, for that matter, by the rule of law announced in the decision of the federal courts, for the two are the same—which makes a lessee or licensee railroad, and its employees engaged in operations upon the road of a lessor or licensor railroad, the agents and servants of the lessor or licensor.

To briefly summarize our points III to V, inclusive, we most respectfully submit that, under the authorities, whether the rule announced by the Illinois courts or that announced by the federal courts be applied, the two rules being identical, the petitioner here was in control of and liable for the operation of the Mobile & Ohio passenger train, the same as if that train had been operated by per-

sons in the general employ of petitioner; that the fact of the collision between the two trains which were in legal effect being operated by petitioner upon its track was such as to bring into operation the doctrine of res ipsa loquitur, and make a prima facie case of negligence on the part of petitioner as the proximate cause of the collision; and that, such negligent collision having resulted in the death of respondent's intestate, who was an employee of petitioner and engaged in interstate commerce in the course and scope of his employment at the time, the petitioner is liable to respondent, under the Federal Employers' Liability Act, for damages for such death.

VI.

Petitioner also asserts that it is not liable for the acts of the servants and employees of the Receivers of the Mobile & Ohio Railroad Company in operating the Mobile & Ohio passenger train over petitioner's tracks, because, it asserts, it is a union station and terminal company organized under what are now Secs. 5251 and 5252, Revised Statutes of Missouri 1939, and, therefore, not subject to the rule creating liability upon a lessor or licensor railroad for the negligence of others who are using its road as its lessees or licensees. This matter was pleaded by defendant below as an affirmative defense (R. 5), but it constitutes no defense in this case for two reasons, viz.: (1) It is wholly without support in the evidence, for all of the evidence conclusively established that defendant is a railroad corporation rather than a union station company, and (2) in any event there is nothing in the law which relieves a terminal railroad company from the rule casting liability upon a railroad for negligence of its lessees or licensees operating trains over its road. Let us consider these reasons separately.

The evidence offered by the petitioner consisted, in part, of Defendant's Exhibit 3, which is the "Agreement of

Consolidation between the Union Railway & Transit Company of St. Louis and the Terminal Railroad of St. Louis, under the name of 'Terminal Railroad Association of St. Louis' " (R. 31). The first paragraph of this agreement specifically states that the Union Railway & Transit Company was "**a railroad company** duly created and organized under the laws of the State of Missouri" and that the Terminal Railroad of St. Louis was "**likewise a railroad company** duly created and organized under the laws of the State of Missouri." The agreement then went on to provide (R. 32):

> " '1. The said Union Railway and Transit Company of St. Louis and the said Terminal Railroad of St. Louis shall be, and the same are hereby wholly consolidated into **one railroad company of the State of Missouri.**
>
> " '2. **The name of said consolidated company shall be "Terminal Railroad Association of St. Louis."** ' " (Emphasis ours.)

Petitioner suggests in its brief here that this Court can and should take judicial notice that the opinion of the Supreme Court of Missouri in State ex inf. Attorney General v. Terminal R. Association of St. Louis, 182 Mo. 284, 81 S. W. 395, and the opinions of this Court in United States v. Terminal R. Association of St. Louis, 224 U. S. 383, 56 L. ed. 810, and in United States v. Terminal R. Association of St. Louis, 236 U. S. 194, 59 L. ed. 535, show the petitioner to be a union depot and terminal company. While we doubt the propriety of this Court taking judicial notice of the facts in those cases, should it do so, it will find that this petitioner was held in those cases to be **a railroad corporation** rather than a union depot company, for the Supreme Court of Missouri, at page 292 of 182 Mo., and at page 395 of 81 S. W., with reference to petitioner here, said:

> "That consolidated corporation was **organized under the general railroad law of this state.** It is the respondent in this suit." (Emphasis ours.)

and this Honorable Court, at pages 406-407 of 224 U. S., with reference to this petitioner, said:

> "* * * **the Terminal Company is a terminal company and something more.** It does not confine itself to supplying and operating mere facilities for the interchange of traffic between railroads and to assistance in the collecting and distributing of traffic for the carrier companies. **It, as well as several of the absorbed terminal companies, were organized under ordinary railroad charters.**" (Emphasis ours.)

The petitioner here was not only incorporated as a railroad company, rather than a mere union station company, but it was actually operating a railroad in interstate commerce at the time here involved. It was, concededly, operating in interstate commerce from Missouri to Illinois the very railroad freight train upon which the deceased was working when he was killed (R. 27), and it was concededly within the operation of the Federal Employers' Liability Act (R. 8) which is by its specific terms applicable only to common carriers by railroad.

In any event, if the petitioner were a company organized under and subject to Secs. 5251 and 5252, Revised Statutes of Missouri 1939, that would not relieve petitioner from the operation of the rule casting liability upon it for the negligence of its lessees or licensees operating trains upon its road. In Clark v. Atchison, T. & S. F. R. Co., 319 Mo. 865, 6 S. W. 2d 954, the same contentions as are made by petitioner here, upon the same line of reasoning, were made in an effort to avoid the effect of the Missouri statutes casting liability upon a lessor or licensor railroad for the acts of its lessees or licensees (Secs. 5162 and 5163, Revised Statutes of Missouri 1939), that the Missouri Supreme

Court rejected such contentions, saying, in part (6 S. W. 2d, l. c. 958-959):

> "**The reasoning, with due deference to learned counsel, seems superficial.** It conclusively appears from the record, including the petition for removal, that the Terminal Company was incorporated as a railroad company and not as a union depot company. * * * Now there is no special statute providing for the incorporation of terminal railroad companies, nor is there one investing them with powers, privileges, and immunities not conferred upon other railroad companies. Terminal companies, such as appellant, are created under the statute relating to railroad companies generally. Article 2, c. 90, R. S. 1919. That statute, including said sections 9879 and 9880 [now Sections 5162 and 5163, R. S. Mo. 1939], is the primary source of their corporate power, and the limitations upon that power which it prescribes are binding upon them, regardless of anything that may appear in their charters. * * *
>
> "But the Terminal Company is unquestionably 'a railroad company' or 'railway corporation,' within the purview of the statutory provisions just referred to. * * *
>
> "In view of the long-established policy of the state of not permitting railroad companies to avoid their charter duties and responsibilities by leasing their roads or permitting other companies to run trains over them, **a legislative intent to relieve to any extent terminal companies from such duties and responsibilities must be made clearly manifest before the courts will be warranted in giving the alleged intent effect.**" (Bracketed portion and emphasis supplied.)

Petitioner here, in contending that the reason for the rule casting liability upon an owner railroad for the negligence of his lessees or licensees fails when the owner railroad is a terminal company, seeks to limit unduly the basis for the rule, and asserts that its sole basis lies in the fact

that a railroad cannot avoid its charter obligations to the public by leasing its properties to another. That, however, is only a part of the story, for, as was said in Chicago & G. T. R. Co. v. Hart, 209 Ill. 414, 417, 70 N. E. 654:

> "Statutory permission to lease its road does not relieve a railroad company from the obligation cast upon it by its charter unless such statute expressly exempts the lessor company therefrom. While the duty which rests upon the lessor companies to operate their roads is an obligation which they owe to the public, the permission given by the legislature, as the representative of the public, to perform that duty through lessees has no effect to absolve such companies from **the duty of seeing that the lessee company provides and maintains safe engines and cars, and that the employees of the lessee company to whom is entrusted the operation of their roads are competent and that they perform the duties devolving upon them with ordinary care and skill, for upon the character and condition of safety of such engines and cars and on the competency and care of such employees depend the lives and property of the general public. As a matter of public policy such lessor companies are to be charged with the duty of seeing that the operation of the road is committed to competent and careful hands**" (Emphasis ours),

and further (209 Ill., l. c. 421-422):

> "The public are interested in the safe and efficient transportation of passengers and property over the line of road the lessor herein was given power to construct and operate. Competent and careful servants, well constructed engines and cars, which are properly inspected and kept in good and safe condition of repair, are essential to the speedy and safe transportation of passengers and property. That such engines and cars to be used in the operation of the railroad shall be provided and kept in good repair is a chartered duty, compliance wherewith is of the greatest concern to the general public. **No more effective means of com-**

> **pelling the performance of that duty can well be conceived than to hold the lessor company responsible to all the world for the actionable negligence of the lessee company.** * * * The liability rests not only upon the ground the lessee company, in discharging the corporate powers and duties of the lessor company, is but the agent or servant as to all other than the lessor company, but also on the ground that sound public policy demands that all corporations which the State has created and given special privileges and powers **shall stand charged with the obligation and duty to see that such powers and privileges are properly exercised and discharged,** unless relieved by express authority of the law-making department of the State." (Emphasis ours.)

This Court, in North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. ed. 591, recognized the full purport of what we have just above quoted from the Illinois Court's decision, when it said (232 U. S., l. c. 254):

> "Under the local law, as laid down in Logan v. Railroad, 116 Nor. Car. 940, the lessor is responsible for all acts of negligence of its lessee occurring in the conduct of business upon the lessor's road; and **this upon the ground that a railroad corporation cannot evade its public duty and responsibility by leasing its road to another corporation,** in the absence of a statute expressly exempting it." (Emphasis ours.)

Manifestly, the fact that the petitioner in the case at bar is a terminal railroad company does not affect in the least its liability under the doctrine which we have heretofore dealt with in this brief.

VII.

Petitioner also contends that it is not subject to the rule making an owner railroad liable for the acts of its lessee or licensee in the operation of the road because, it asserts, the use of its tracks by the Mobile & Ohio was not volun-

tary on its part, but was forced upon it by certain decisions of this Honorable Court, hereinbefore mentioned (ante, p. 37), and that, under those decisions petitioner became the agent and servant of the Mobile & Ohio.

This purported defense, if it were any defense, would not be available to the petitioner here because it is, at best, an affirmative defense, by way of confession and avoidance, which was not pleaded nor proven by the petitioner. Such a defense confesses the use of petitioner's road by the Mobile & Ohio, which fact in itself casts liability upon the petitioner for the acts of the Mobile & Ohio in the latter's use of petitioner's road, and seeks to avoid the effect of that fact by showing such fact to have been brought about through compulsion rather than through voluntary conduct on petitioner's part—all of which obviously demonstrates that such a defense is an affirmative one. Certainly, no extended citation of authority is necessary to establish that where, as here, an affirmative defense is not pleaded in the trial court, it is not available in an appellate court (Cf. Merchants' Mutual Insurance Company v. Baring, 20 Wall. [87 U. S.] 159, 164-165, 22 L. ed. 250; Nulsen v. National Pigment & Chemical Co., 346 Mo. 1246, 145 S. W. 2d 410, 414).

Another reason why this purported defense is not available to the petitioner here lies in the fact that there was no evidence offered at the trial to support any such defense. The evidence in this record shows only that the Receiver for the Mobile & Ohio used defendant's tracks over a long period of time, under an arrangement whereby such Receiver paid petitioner compensation for such use, upon the same basis as compensation was paid petitioner by any other railroad for such use of such tracks (R. 11). There is nothing in the pleadings or the evidence that even faintly suggests that the relationship between petitioner and the Mobile & Ohio was involuntary on petitioner's part, and such purported defense is, obviously,

not now available to petitioner (Cf. Merchants' Mutual Insurance Company v. Baring, 20 Wall. [87 U. S.] 159, 164-165, 22 L. ed. 250; State ex rel. Rothrum v. Darby, 345 Mo. 1002, 137 S. W. 2d 532, 543).

Without any evidence in support of this imaginary defense ever having been presented, how can this Court determine that the petitioner was forced into an involuntary arrangement, the exact nature and character of which is no more than a detail in the petitioner's method of handling its business, whereby the Receivers of the Mobile & Ohio were authorized and permitted to use the petitioner's tracks? How, without there being any evidence offered on the matter either way, can it be said that the arrangement between the petitioner and the Mobile & Ohio was involuntary rather than voluntary? How, in the face of an established rule of law which, under such evidence as was adduced, makes the Mobile & Ohio Receivers and their servants and employees, the agents and servants of the petitioner, and in the absence of any evidence to the contrary, can this Court determine that that arrangement constituted the defendant an agent and servant of the Mobile & Ohio Receivers, as is contended by petitioner? Petitioner would have this Court assume facts favorable to it without there being any evidence one way or another as to the existence of such facts, merely from reading a decision or decisions of this Court which do no more than order and approve a reorganization of the contracts between the petitioner and its proprietary railroads, without this Court knowing anything about the details of the arrangement between petitioner and the Receivers of the Mobile & Ohio. This, we submit, cannot be done, for it would put the petitioner in the position of being able, upon appeal in any case, to then fix as voluntary or involuntary, as best suited petitioner in that particular instance and at that particular time, the status of its arrangement with any railroad for the use of its tracks.

There being no evidence in this case tending to support this purported defense now urged by petitioner, respondent is in no position to here undertake to discuss the merits of any such purported defense, and of a certainty this Court is likewise in no position to do so.

However, in this connection, let us point out that the lone case upon which petitioner relies for its assertion that it is relieved of liability under the rule making a lessor or licensor railroad liable for the acts of its lessees or licensees, because of the assertion that the use of petitioner's tracks by the Mobile & Ohio was "involuntary" on petitioner's part, viz., Smith v. Philadelphia, Baltimore & Washington R. Co., 46 App. (D. C.) 275, is not in point, and was determined upon an entirely different theory than is contended here by petitioner. In that case the defendant and the other railroad companies which owned the various terminal properties in Washington, D. C., and the various railroad companies which might desire to use those properties, by specific act of Congress (Act of February 28, 1903, 32 Stat. 909, 917, c. 856), were given

> "* * * **power to contract** with each other * * * in regard to the construction, maintenance, **use or operation** of any line or lines of railroad, terminals, terminal tracks, stations, or other works * * * **upon such terms as may be agreed upon between the parties to any such contract**" (emphasis supplied),

and the railroads owning the terminal properties, including defendant, did contract with the Southern Railway Company for its use of the terminal properties, and the contract specifically provided, *inter alia* (46 App. [D. C.], l. c. 283):

> "* * * that all losses and damages resulting from the fault or negligence of employees solely in the service of * * * either of the parties hereto * * * **shall be wholly borne by that party whose employees are**

> **at fault, or negligent, * * * and such party shall be wholly responsible and liable for the consequences thereof.**" (Emphasis supplied.)

The plaintiff there, whose intestate was an employee of the defendant, was killed by the negligent operation of an engine of the Southern Railway Company upon defendant's terminal tracks, and the plaintiff offered this contract in evidence as a part of her case. The Court, in holding the defendant not liable, in view of the act of Congress and the contract, said (46 App. [D. C.], l. c. 286):

> "**The question is not governed by those cases which have relation to leases by one railroad company to another for the operation of its tracks.** The contract in this case by which the Southern Railway Company was entitled to the use of the tracks of defendant * * * was entered into **by virtue of Congressional legislation** which * * * authorized the [companies] * * * to contract with each other * * * in regard to the construction, maintenance, **use, or operation** of any line or lines of railroad, terminals, terminal tracks, stations, or other work or properties * * * **upon such terms as may be agreed upon between the parties to any such contract**" (bracketed portion and emphasis supplied),

and, further (46 App. [D. C.], l. c. 288):

> "It is clear then that the plaintiff's intestate was an employee of defendant; that he was killed upon defendant's tracks by an engine operated by the Southern Railway Company **in accordance with the provisions of the Act of Congress and of the contract aforesaid.** The negligence was the negligence of the Southern Railway Company, and not of the defendant * * *." (Emphasis supplied.)

Manifestly, the decision in that case was founded solely and only upon the specific power, given to the particular de-

fendant by the act of Congress, to relieve itself by contract of the liability which the law otherwise would have cast upon it for the use of its tracks by its lessees and licensees, together with the contract which did so relieve the defendant of that liability. In other words, the defendant there had specific legislative authority to, and it in fact did, relieve itself by contract of liability for the acts of its lessees and licensees. No such power or authority was vested in the petitioner in the case at bar, and even if petitioner here had power to relieve itself by contract of liability under the general rule, there is no evidence that it did so. That a carrier cannot, without specific legislative authority, relieve itself by contract of the liability which a rule of local law passed upon it for the acts of its lessees and licensees, was fully recognized by this Court in North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591, when it said (232 U. S., l. c. 254):

> "Under the local law, as laid down in Logan v. Railroad, 116 Nor. Car. 940, the lessor is responsible for all acts of negligence of its lessees occurring in the conduct of business upon the lessor's road; and this upon the ground that a railroad corporation cannot evade its public duty and responsibility by leasing its road to another corporation, **in the absence of a statute expressly exempting it.**" (Emphasis ours.)

The local law in Illinois, which is identical with that in North Carolina, is expressed in Chicago & G. T. R. Co. v. Hart, 209 Illinois 414, 70 N. E. 654, where the Supreme Court of Illinois said (209 Ill., l. c. 422):

> "The liability [of a lessor or licensor railroad for the acts of its lessees or licensees] rests not only upon the ground the lessee company, in discharging the corporate powers and duties of the lessor company, is but the agent or servant as to all other than the lessor company, but also on the ground that sound public

policy demands that all corporations which the State has created and given special privileges and powers shall stand charged with the obligation and duty to see that such powers and privileges are properly exercised and discharged, **unless relieved by express authority of the law-making department of the State.**" (Bracketed portion and emphasis supplied.)

The case of Smith v. Philadelphia, Baltimore & Washington R. Co., supra, so strongly relied upon by petitioner, in fact emphasizes what we have previously said under point V to the effect that a dominant rule of local law must be considered, even though the case arises under the Federal Employers' Liability Act. In that case the contract between the carriers, which was authorized by the local law, was held to be binding in the determination of whether the lessor or licensor railroad was liable for the acts of its lessees or licensees, and, because the contract, which was authorized by the local law, did not hold the lessor or licensor railroad so liable, the lessor or licensor railroad's employee was denied a recovery. Had the railroads there contracted otherwise, they could have created a liability for the death which occurred there. In the case at bar the dominant rule of local law made the petitioner, Terminal Railroad Association of St. Louis, liable for the negligence of the agents and servants of its lessee or licensee, the Receivers of the Mobile & Ohio Railroad Company, as effectually as a written contract could have done so, and, therefore, liable to this respondent for the death of her decedent, an employee of petitioner, which resulted from the negligence of petitioner's said lessee or licensee.

CONCLUSION.

For the reasons, and upon the authorities, hereinbefore referred to, we most respectfully submit that the judgment below was for the right party; that there were no errors in

the judgment below materially affecting the substantial rights of the parties; that, accordingly, review of the opinion and decision of the Supreme Court of Missouri would serve no useful purpose; and that, in any event, petitioner has stated no proper ground for review of the opinion and decision of the Supreme Court of Missouri by writ of certiorari. Accordingly, respondent most respectfully submits that petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

MARK D. EAGLETON and
ROBERTS P. ELAM,
Attorneys for Respondent.

(14)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,
Petitioner,

vs.

JULIA C. MILLER, Administratrix of the Estate of Ernest F. Miller, Deceased,
Respondent.

No. 433.

PETITION FOR REHEARING

and

BRIEF IN SUPPORT.

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Cases Cited.

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PETITION FOR REHEARING.

Comes now petitioner in the above cause, within twenty-five days from the entry of the order of this Court denying its petition for the issuance of writ of certiorari, and prays this Court to rehear and grant such petition. As grounds therefor petitioner says:

I.

It has unintentionally failed to emphasize the significance of its unusual relation to the railroad companies which use its rails and other facilities in St. Louis, Missouri.

The decision of the Court below is based solely on the applicability of the lessor-lessee doctrine. The holding is that because decedent's injury occurred in Illinois, where the state courts apply that doctrine, petitioner is liable merely because it permitted the M. & O. to use its tracks.

It must be borne in mind that the lessor-lessee rule is founded upon the theory of a voluntary failure on the part of a railroad company to fulfill its franchise obligations and perform its franchise duties, "so far as the general public is concerned." Hulen v. Wheelock, 300 S. W. 479, 485. The key words are "voluntary" and "general public." As we understand the principle, it is at no time applicable unless the failure to perform is voluntary rather than involuntary, and is to be invoked only upon such voluntary failure to perform its duty to the public.

Is petitioner subject to this principle of law, or do the facts here place it beyond the boundaries of its influence? Petitioner says it is not to be governed by that principle because:

1. It has not voluntarily surrendered its road to another; but to save its corporate life has been compelled by this Court to permit other railroad companies to use its facilities "upon such just and reasonable terms as shall place each user upon a plane of equality" of burdens and benefits with every other user. U. S. v. Terminal Railroad Association, 224 U. S. 383, 56 L. ed. 810, 820.

2. It has neither failed to perform its duties under its charter "so far as the general public is concerned." East Line, etc., Ry. Co. v. Culbertson (Tex. Sup.), 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 807; Williard v. Spartanburg, U. & C. R. Co. et al., 124 F. 796, 800; nor escaped "responsibility for the performance of the public duties for which it was chartered." Hulen v. Wheelock (Mo. Sup.), 300 S. W. 479, 485 (not published in the official reports).

3. Petitioner's charter purposes were to furnish facilities for the use of trunk line railroads. Therefore, it was scrupulously fulfilling its franchise duties by permitting M. & O. to use its rails.

BRIEF IN SUPPORT OF PETITION FOR REHEARING.

I.

Has petitioner voluntarily surrendered its railroad facilities to another? To answer the question we turn to two decisions of this Court: United States v. Terminal Railroad Assn., 224 U. S. 383, 56 L. ed. 812, and United States v. Terminal R. R. Assn., 236 U. S. 194, 59 L. ed. 535.

In the first of these cases the United States filed a bill against petitioner seeking its dissolution on the ground that it and a number of associated companies had violated the Sherman Act by creating a combination in restraint of interstate commerce and a monopoly forbidden by that law. This contention was based upon the theory that petitioner's proprietary lines, acting through petitioner, could prevent other lines of railroad who so desired from serving St. Louis, because petitioner's facilities were the only means of ingress and egress, thereby giving petitioner and its proprietary lines a monopoly upon St. Louis railroad traffic.

The cause was heard by four circuit judges who, because of an equal division in judgment, dismissed the bill. The United States took the case to this Court, which determined that there had been a violation of the Sherman Act, and ordered petitioner's dissolution unless it met seven requirements set out in the opinion, one of which was that petitioner should provide "for the admission of any existing or future railroad to joint ownership and control of the combined terminal properties, upon such just and reasonable terms as shall place such applying company upon a plane of equality in respect of benefits and burdens with the present proprietary companies." United States v. Terminal R. R. Assn., 224 U. S. 383, 411, 56 L. ed. 810, 820.

Assuming, solely for argument, then, that a charter duty rested upon petitioner to permit none but its own trains and motive power to move over its lines, has petitioner "voluntarily" surrendered its road to another, or voluntarily permitted other railroads to use its facilities? Under this Court's decree, supra, unless petitioner permits all railroad companies who so desire to use its facilities "upon a plane of equality in respect of benefits and burdens with the present proprietary companies," it will be dissolved, on the ground that it is a member of a combination in restraint of interstate commerce under the Sherman Act. On the other hand, if it complies with this Court's order the Missouri Supreme Court holds it has "voluntarily" surrendered "its road to another," and is consequently liable for the acts of the user. It cannot be the law that petitioner must under this Court's mandate permit all trunk-line railroads to use its facilities and at the same time be held responsible for the acts of each trunk-line user of its facilities, on the ground that it has "voluntarily" turned over such facilities to such trunk line users.

The principle involved in Denton v. Yazoo & M. Valley R. Co., 284 U. S. 205, 76 L. ed. 310, is closely analogous. In that case the Court held that where the railroads, under Congressional Act, were obliged to "furnish the men necessary to handle the mails, to load them into and receive them from the doors of railway post office cars," etc., the defendants were not responsible for injury to a mail clerk resulting from the negligence of a servant in the general employ of the defendant railroad companies, while loading mail into a mail car under the direction of a United States postal transfer clerk, and was not, as to that work, under the direction or control of either of the railroad companies.

In the case at bar the defendant was compelled by direction of this Court "to lend" its facilities to the trunk-line

railroads, just as in Denton's case the defendants were compelled "to lend" their employee. The salutary rule announced in Denton's case, which relieved the defendants of liability because of their compliance with their legal duty, is by the stronger reason applicable in the case at bar where the subject matter "lent" by legal command, is an inanimate facility, the physical condition of which was admittedly in no way responsible for decedent's death.

II.

Has petitioner failed to perform any of its charter duties which are due the public? Unless it has "voluntarily" abandoned the operation of its facilities (discussed supra), to the detriment of the public, the principle of lessor-lessee liability cannot be decisive. Being a public utility it has certain obligations which are implicit in its charter, the principal one of which is, of course, the performance of its duty to the public as such a utility.

Originally the rule was created to cover instances where A railroad company transferred all of its property to B railroad, and made no pretense of operating a railroad, whereas B railroad operated its own trains over A's line and was in complete control of all of A's facilities. Thus, if so minded, A company could turn over its properties to B company, a wholly irresponsible corporation, and the public would have no redress whatever for torts committed in the operation of the railroad properties. Moreover, one injured by the operations of B company and who knew nothing of the relations between that company and A company, "might be at loss to determine against which to bring his action and thereby be placed at a disadvantage in seeking redress." East Line etc. Ry. Co. v. Culberson (Tex. Sup.), 10 S. W. 706, 3 L. R. C. 567, 13 A. St. Rep. 807; Williard v. Spartanburg, U. & C. R. Co. et al., 124 F. 796, 800.

Respondent's decedent was not a member of the public, but was one of petitioner's employees who knew, of course, that he was such employee, that he was riding on one of his employer's trains, and that the M. & O. used his employer's tracks. This knowledge was in his widow, the respondent, as well as in her counsel. This record so shows, as respondent took and introduced in evidence the deposition of the conductor of the M. & O. train. Therefore, in this particular case, there was no member of the public involved. How then could petitioner's duty towards the public be an element?

It is, therefore, demonstrated not only that petitioner has not "voluntarily" turned over its property to another railroad company, but just as conclusively, that no member of the public and no duty owed by petitioner to the public are involved in this action. The reason for the lessor-lessee rule, therefore, does not exist under the facts in this case. Why then should the rule be applied?

Viewed from a different point we find that there is but one fundamental justicial reason for the existence of the rule which makes an owner railroad company liable for the acts of a user railroad company, viz., the voluntary failure of the former to fulfill its franchise obligation to the public to operate a railroad. When this principle ceases to govern, necessarily the responsibility created by it is at an end.

The determining factor here then is basic rather than derivative. Thus, as between owner and user, the responsibility is fixed by the law of contracts, i. e., breach of the franchise or charter—the owner's contract with the state; but as between the owner and the injured person, responsibility is fixed by the law of torts. Before liability can arise under the law of torts there must be a defendant's breach of duty resulting in injury to one to whom the duty is owed. Obviously the existence of the duty is essential; and it cannot exist unless created

by law. Before there can exist liability in tort, therefore, there must be: (1) a duty, (2) breach thereof by defendant, and (3) resulting injury to the person to whom the duty runs.

In the case at bar the first requisite (a duty) is absent. We cannot but feel that in our petition for writ of certiorari we failed to make this clear.

Was there any duty cast upon petitioner in the premises? It was admittedly no physical act on the part of petitioner which caused respondent's husband's death. It could have been guilty of none except through decedent, who failed to flag the oncoming M. & O. train. Had such failure caused his death, there could have been no recovery here in any event, as he would have been the author of his own undoing. Atlantic Coast Line v. Driggers, 279 U. S. 787, 73 L. ed. 957.

Thus respondent is driven to the position that the act which produced her husband's death was done by M. & O. What duty then did petitioner owe decedent? Under the terms of the Federal Employers' Liability Act (hereinafter called the Act) liability of an employer railroad company is based only upon negligence of such railroad company. It is not claimed here that petitioner was guilty of an act of negligence in fact, but only of negligence in law—that is, a legal rather than a factual breach of duty. But before there can be a legal (as here used) breach of duty, the law must create the duty. Under the facts here there is but one possible theory of the creation of that duty, i. e., the fact that M. & O. was running its train over petitioner's track, which alone can create a duty upon petitioner to see to it that M. & O. was guilty of no negligence. Unless this duty was cast upon petitioner by the mere fact that M. & O. was permissively using petitioner's track, no duty rested upon petitioner to make certain M. & O. was not negligent.

Does the law cast such duty upon petitioner? Does it come within the general rule, federal or state, or does it come within an exception to that rule?

The basis for the lessor-lessee rule is that a railroad company's charter is a contract between it and the granting authority that the railroad company will properly and legally exercise its franchise rights and fulfill its franchise obligations or duties to the public. So long as it properly and legally exercises its charter rights and meets properly its charter obligations, just that long does it fulfill its duties both to the charter granting authority and the public. It may not be said with any degree of logic that a railroad company may be penalized or may in any way incur liability for damages merely because it is exercising its charter rights and fulfilling its charter obligations. We shall inquire then whether or not petitioner has broken its charter.

III.

Has petitioner failed in any manner, voluntarily or involuntarily, to fulfill its charter duties, public or private? In 1874 the Union Depot Company of St. Louis was organized to construct a union depot in that city and to lay the necessary tracks for the use of such depot when ready for use, to connect with the tracks of other railroad companies which desired to use the station (R. 39). The Terminal Railroad of St. Louis was organized in 1880, for the purpose of constructing tracks from the Union Depot Company of St. Louis, to connect with tracks of various railroad companies mentioned, for the purpose of providing "the most ample and convenient connections, accommodations and terminal facilities in St. Louis for all railroads now entering, or hereafter to enter, the same, and all individuals and companies doing business with said railroads" (R. 30, 31). In 1889 the Union Railway and Transit Company (one of the companies mentioned in the charter of

Terminal Railroad of St. Louis) and Terminal Railroad of St. Louis consolidated to form petitioner.

These documents establish beyond the possibility of a doubt that the charter purpose of petitioner is being strictly fulfilled, i. e., the furnishing of terminal facilities to other railroad companies entering St. Louis. How then may it be said that it is failing to fulfill its franchise obligations?

This Court recognized the difference between petitioner and a trunk-line railroad in United States v. Terminal Railroad Association, 224 U. S. 383, 56 L. Ed. 810, 816, where it said:

> "We are not unmindful of the essential difference between terminal systems properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines, and in the collection and distribution of traffic. They are a modern evolution in the doing of railroad business, and are of the greatest public utility."

The Supreme Court of Missouri recognized the difference in State ex inf. Terminal Railroad Association, 182 Mo. 284, 296, where it said:

> "Thus when the Convention was in session there were in the State corporations engaged in carrying over their railroads freight and passengers from one city to another, and other corporations engaged in transferring the cars brought by a railroad to its terminus in a city to some other point in the same city or to a common terminus of all railroad traffic in that city. The characters of the business of the two kinds of corporations were essentially different, though both related to railroad traffic. The one was railroad business in its ordinary meaning, the other railroad business of a special character. A law might naturally be designed with reference to the one without being intended to affect the other."

Thus the difference between the two kinds of railroad companies is recognized by both this Court and the court below. Nevertheless both courts have overlooked these differences else the result would have been a reversal of the judgment herein in the court below and the issuance by this Court of its petition for certiorari here sought.

Authority and responsibility must go hand in hand; responsibility must be based upon correlative authority. It violates the most fundamental principle of justice to make A responsible for B's doings when he has no authority or control over B's actions. Applying the principle to the facts here it is seen that petitioner has no authority to prevent the M. & O. from using its facilities, but must permit it to operate over its facilities. It is an impossibility for petitioner to control the actions of an M. & O. engineer who while passing over petitioner's track sees another train on the same track ahead of the M. & O. train and carelessly refuses to stop the M. & O. train in time to avoid the inevitable collision. Thus petitioner is placed in the position of being compelled to permit its tracks to be used by the M. & O., cannot control the actions of the latter's engineer, who wantonly kills respondent's decedent, and yet is held responsible. Such a theory is violative of the most primary principles of justice.

IV.

It is noticed that in her brief in opposition to the petition for certiorari respondent takes the position that petitioner's counsel in his argument to the jury in the trial court admitted petitioner's liability, and cannot now contend otherwise. For fear that this contention may have persuaded this Court to deny the petition herein, may we state that there is no merit in such contention. It was made in the court below and properly ignored by that Court. Petitioner's counsel said to the jury that under the law as

declared by the trial court petitioner was liable. That is far from saying that the law given by the trial judge was correct. It was not so intended and was not so stated. The theory of petitioner is shown by the instruction (R. 57) which it requested and which the trial court refused to give, presenting the exact theory now being presented to this Court.

For these reasons petitioner earnestly and sincerely believes that this Court should grant a rehearing and order certiorari to issue herein to the Supreme Court of Missouri.

Respectfully submitted,

JOSEPH A. McCLAIN,
LOUIS A. McKEOWN,
ARNOT L. SHEPPARD,
Attorneys for Petitioner.

Joseph A. McClain, Louis A. McKeown and Arnot L. Sheppard, attorneys for petitioner herein, state the above and foregoing petition for a rehearing is filed by them in good faith and for the reasons therein set forth; that it is not filed for delay or for any purpose other than to secure a rehearing of petitioner's petition for certiorari.

Joseph A. McClain,
Louis A. McKeown,
Arnot L. Sheppard.